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TREATISE ON *COPYHOLDS.*

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OF THE MIDDLE TEMPLE,

AUTHOR OF AN ESSAY ON THE LAW OF DESCENTS, &c.

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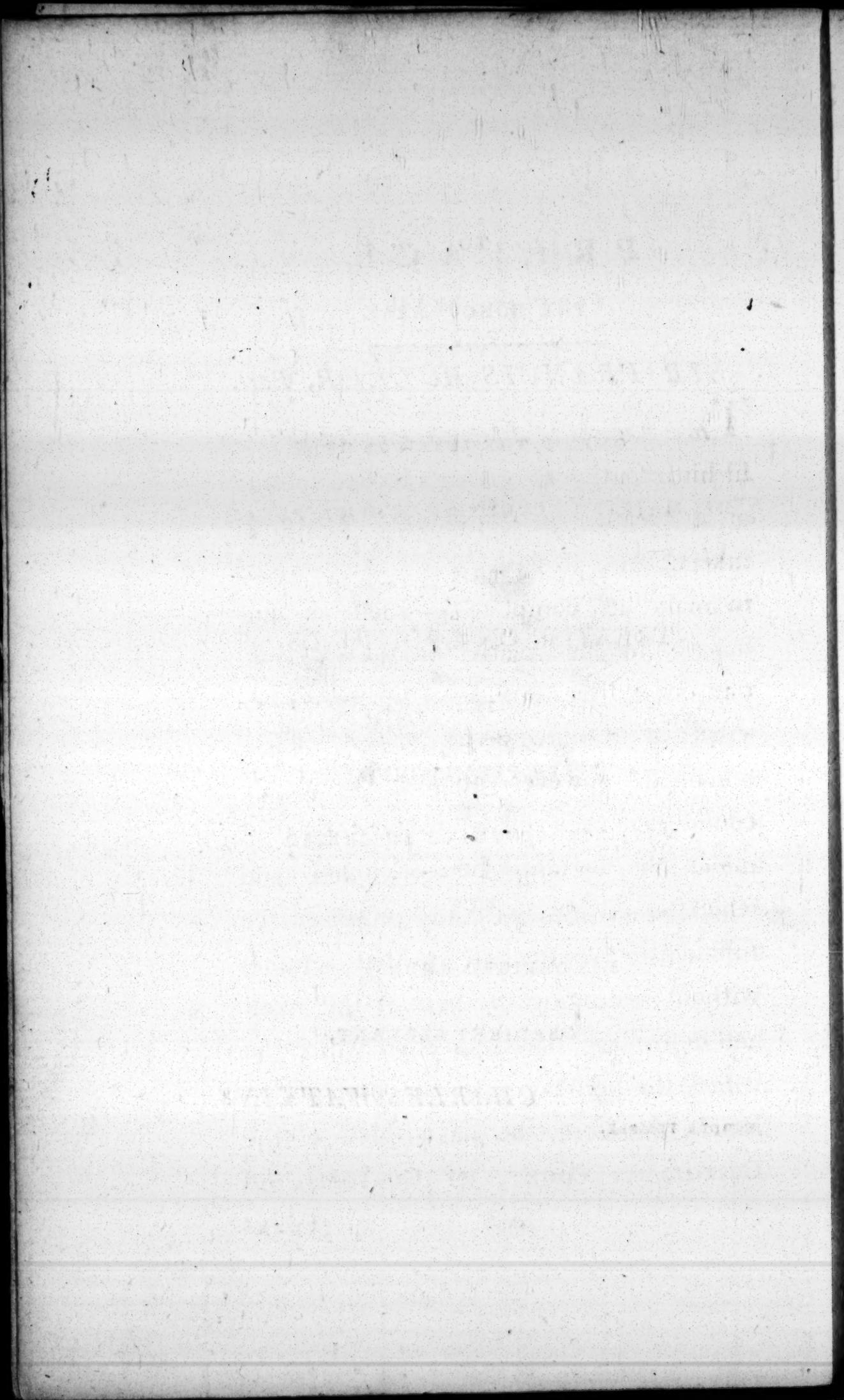
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TO
THE HONOURABLE
SIR FRANCIS BULLER, Bart.
ONE OF THE JUSTICES OF
HIS MAJESTY'S COURT OF COMMON-PLEAS,
THIS
TREATISE ON COPYHOLDS
IS,
(WITH PERMISSION),
MOST RESPECTFULLY INSCRIBED
BY
HIS OBLIGED AND
OBEDIENT SERVANT,
CHARLES WATKINS.
MIDDLE TEMPLE.



P R E F A C E.

THE Author is at length enabled to fulfil his intention of giving a second volume of a Treatise on Copyholds. The first, indeed, was, so far as he was empowered to make it, complete in itself: it embraced the law relative to the **NATURE, CREATION, TRANSFER, AND DESTRUCTION, OF COPYHOLD INTERESTS.** There remained, however, subjects which he considered as necessary to be treated of under the learning of copyholds, and which could not, with any propriety, be sufficiently investigated in that volume, without deranging the plan of the work and destroying the connection which he wished to preserve. In the present volume, therefore, he has treated of the **CUSTOMARY COURT, of CUSTOMS, of**

PREFACE.

FREEBENCH and of CURTESY, of GUAR-
DIANSHIP, of LICENCE, of HERIOTS, of
SUIT, of RENT, of CORPORAL SERVICES,
and of THE APPLICATION OF THE STA-
TUTE-LAW TO COPYHOLD PROPERTY.

He has pursued the same method in the present, as he pursued in the former, volume. He has been brief; and, where the subject permitted him, he has endeavoured to extract consistency. This he found, however, was not always even to be hoped for. He found reporter against reporter, and case against case. He found consequences continue when their causes had ceased. He found conclusions, which justly followed from premises which once existed, applied to instances in which those premises could not exist. He found arbitrary assertion adopted by servility, cherished by prejudice, and at length matured into doctrines whose law could not be questioned, but whose absurdity was

too apparent to be denied. It must not, therefore, be wondered at, if, when so situated, he has, in some instances, left the law in all its *glorious uncertainty*: and to such uncertainty must it always be subject, while we consider common-sense as subservient to precedent, and suffer the blunders of one age to be the *criteria of right* in another.

Much still remains for investigation. Our laws of property are so connected with each other, that some relation to the doctrine of copyholds may be traced in most of them. What, however, may be deemed necessary to a system of copyhold law which is not treated of in these volumes, the Author must leave to those who have better health, and are better calculated for the undertaking, than himself.

Much, too, may be expected which did not belong to him to perform. It has

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even been intimated to him, that the law relative to COURTS-LEET was expected: but he must beg leave to say once more that he was writing on the law of COPYHOLDS; and surely the law of courts-leet formed no part of *that* law. He might as well have given a dissertation upon thunder, or upon the seat of the soul. He has sometimes, indeed, incidentally noticed the laws relative to freehold, when treating of those relative to copyhold, property; but it was only by way of illustration, or because they could not be separated.

In order to render the work more generally useful and more easy to be consulted, the Author has incorporated the index to the cases into one alphabet; as he has also done with the general index.

In the conclusion of his preface to the preceding volume, he intimated that, as
the

the present one would, in many parts, relate more immediately to local matter, the communication of any curious entries, customs, &c. relative to particular manors, would be much esteemed. He was induced to make such intimation from being sensible that such entries, &c. though immediately of local relation, frequently illustrated the general law. However, it only remains for him to say that not a single communication has been made to him in consequence of what he then said; and, therefore, he has no one to thank. The communications which he received were from friends, who made them independently of that intimation, and towards whom he shall retain a just sense of gratitude.

Whatever the defects of this Treatise may be, the Author now commits it to the world; conscious that some pains have been taken

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to make it useful, and satisfied that they will not be wholly disregarded by those, the approbation of whom only, he feels any wish to obtain.

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ON COPYHOLDS.

ON
C O P Y H O L D S.

CHAP. I.

OF COURTS.

ACCORDING to the feudal law, every chief or lord had a jurisdiction commensurate with his territory. The king, as supreme or chief lord, or lord paramount, had authority over the whole realm. The alderman, or earl, had jurisdiction over his county; and each baron, or chief, over his manor or lordship: and thus was justice brought to the doors of every man.

As the lord, however, was not suffered to judge in his own cause, nor could exercise

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ercise authority over a person who was the tenant of another chief, if any dispute arose between the lord and tenant, or between the tenants of different manors or districts, the cause was brought before the tribunal immediately above, till it reached the king's council or national court-baron.

In criminal
causes.

The jurisdiction of each lord originally extended over criminal, as well as civil, causes occurring within his manor. But, as the country became more settled, his authority became proportionably abridged. Before the national courts could extend their influence to the more remote districts, inhabited by a barbarous and ferocious race, they required the assistance of a chief who resided immediately on the spot where the crime was committed, and who possessed an actual power to punish the offender: but, when the people became more civilized, and the jurisdiction of the superior courts became more acknowledged and obeyed, the assistance of the immediate chieftain became less necessary; and

and his authority, of consequence, decreased.

Hence we find that at a very early period the criminal jurisdiction was no longer considered as inherent in the immediate lord. All courts of criminal jurisdiction were deemed *the king's courts*; and not to be held by the subject without a special grant from the crown, or by prescription, which implied such grant. Hence, though many lords of manors are enabled at this day to hold courts-leet (a) Courts-Leet, within particular precincts or districts, yet they do not hold them *as lords of manors*; *i. e.* as being incidental to their particular lordships, but by virtue of a special charter of the king.

(a) As to treat of the court-leet is entirely without the plan of the present work, the author feels much pleasure in being able to refer the reader to a pamphlet, in which the jurisdiction of, and proceedings in, that court, are treated of in a very masterly and perspicuous manner, entitled, “*The Jurisdiction of the Court-Leet exemplified in the Articles which the Jury or Inquest for the King in that Court is charged, &c. to enquire of and present, &c.*” printed for J. Butterworth, London.

In civil causes.

And, even in their civil jurisdiction, the lords soon began to experience much restriction. They were not permitted to hold pleas of personal actions where the debt or damages amounted to forty shillings: nor could they intermeddle with the right of freehold of their tenants but by virtue of the king's writ.

Court baron. The court-baron, thus restricted, was, however, incidental to the manor; it was a necessary and inseparable concomitant. And to the court-baron every *freehold tenant* of the manor was, and is still, obliged to do suit.

Customary Court.

Thus the court-baron was the court of the frank-tenants; and in which the villein, or base-tenant, could not appear. The lord, therefore, held another court for those persons who held of the manor by villein or base services, who were dependent on his will, or claimed merely by custom; and which therefore took the appellation of the villein, the base, or the customary court.

Of

Of this court, as contradistinguished from the court-baron, am I now to speak: for with a court-baron, as a court-baron, *copy-holders* have nothing to do. The customary court, or court of villeins, or, at least, of those who hold by villein or base tenure—and the court-baron, or the court of the freemen, or of those who hold by frank-tenure—have, indeed, been too generally confounded; though they are in their nature most evidently distinct (*b*).

The person who held by villein service was not the peer of him whose tenure was free: nor, consequently, could he owe suit to a court where the rights of the frank-tenants were cognizable. And, on the other hand, the freeholder could owe no-suit to a court which could only take cognizance of rights with which he could have no concern.

The customary-court, however, like the court-baron, was incident to the manor.

(*b*) See *Watk. N.* LXXXVIII. and LXXXIX.
to *Gilb. Ten.* p. 432—4.

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If there were tenants who held by villein-services this court followed of necessity; as without this court the business of the latter tenants could not have been transacted.

Who may hold a customary-court.

Every person, therefore, who has a manor or of which others hold by copy or base tenure (*c*), may, as a necessary consequence, hold a customary-court.

Partners.

Whenever a manor, therefore, becomes divided (*d*), so that part of the copyhold-tenants is allotted to one, and part to another, it should seem the customary-courts must be accordingly multiplied (*e*). As

(*c*) For it is not necessary that there be any free-tenants holding of the manor: for if all the free-tenancies escheat, or the lord release the tenure and services of all his free-tenants, yet he may hold a customary-court for his copyholders. 4 Co. 26. b. Melwich's case.

(*d*) See *Ante*, vol. i. ch. i. p. 16.

(*e*) In the book of *Doomsday* is the following entry: "Duo Frs: tenuer: in paragio, qsq: habuit *Haula*:"—*Berchscire*:—*Terra Gislebti de Brerevile*:—*Hevaford*, in *Merceba*: *Hd*:

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one lord could not hold a court for another, each must have held a separate one from the nature of the thing; as the court must be holden by some or other, that the tenants be not injured.

So if the widow of a lord be endowed Dowress. of the manor, and several copyhold tenements be assigned her in dower, she may hold a customary-court for the copyholds assigned (f).

So if the freehold of *several*, or of *all*, the Grantee of copyhold tenements of a manor be granted or demised to a person, it is said (g) that the grantee may hold such court: though the grantee of the freehold of a *single copyhold* cannot (h). If no court could be held by the grantee of several copyholds, at least, it might be attended with preju-

(f) *Cro. Eliz.* 661. *Gay v. Kay.*

(g) *Ibid.* 662. Sir Christopher Hatton's case cited 3 *Leon.* 109. S. C. cited. 4 *Co. 26.* a. and b. Mel-wich's case, and Neale & Jackson.

(h) 4 *Co. 24.* b. and 25 a. Murrel & Smith, and Neale & Jackson, *ubi supra.*

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dice to the copyholders; which it would be wrong to suffer as a consequence of the lord's own act. But it seems clear that the grantee could *not* make *a new grant* of an escheated or forfeited copyhold, to be held *by copy* again (*i*).

Where to be held.

Within the manor,

A customary-court should be kept within the manor for which it is held (*k*). And this not only from the manifest inconvenience which the tenants might sustain from being compellable to go wherever the lord should be pleased to require their attendance, but from the known feudal principle already noticed that a court was incident to every district, and justice brought home to every door; which principle would be frustrated by the lord's obliging the tenants to go elsewhere for justice,

or honour.

If, indeed, the lord have an honour extending over several manors, a court held anywhere within the honour may be good

(*i*) See *Ante.* vol. i. ch. i. p. 18.

(*k*) *Cs. Litt.* 58. a. and see *Cs. Copyb.* s. 31. Tr, 47—8. 50. 4. *Cs. 24.* a. Clifton & Molineux.

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by custom (*l*), as to the customary tenants; though not, perhaps, as to the free; as the former were more dependent upon the lord.

But it may be held anywhere within the manor, at the pleasure of the person holding it (*m*); unless some ancient custom require it to be held at a certain place.

In very ancient days courts, whether Courts held for deliberation or the administration of justice, were held in the open air. And when we consider the number of persons who frequently assembled, we may well conclude that they could not conveniently be held elsewhere (*n*).

Thus we read in the *EDDA* (*o*), that,
“when governors were established in the

(*l*) *Cro. Car.* 367. *Seagood v. Hone.* *Co. Litt.* 58, a. 4 *Co. 24. a.* *Clifton & Molineux.*

(*m*) So of a court-baron. *Kibb.* 95. b. *Co. Copyb.* f. 31. p. 50.

(*n*) And see *1 Tyrr. Hist. Engl. Introd.* civ. cv:

(*o*) *Fab.* vii.

beginning,

beginning and ordered to decide whatever differences should arise among men, they assembled in the plain of IDA."

The Welch and Irish, and other ancient nations, held also their courts of justice in the open air; and, generally, on the slope of a hill. The judge took advantage of the eminence, and also, as we find, of the wind; for we read that he very wisely sat with his back to it, and so opened the court; and the people being ranged beneath him, he could both see and be seen more commodiously (*p*).

Indeed, so prevalent was this custom among the Britons, that the "top of a hill," or "eminence," became, at length, significative of a court of justice; and the names of several persons who had jurisdiction were allusive to it (*q*). And vestiges

(*p*) See *Whit. Manch. B. 1. C. 8.* p. 277, &c. 4to. and 376, 8vo. and the authorities cited. *Cand. Brit. Isle of Man. Spelm. Glos. voc. Mallobergium.*

(*q*) See *Owen's Welch Dict.* *voc. Bre, Brezyn, Breyr, Crug,* &c.

of this custom remain among us to this day in the *Moot*, or *Mute*, or *Parling Hills*, still known in various parts of this and the neighbouring islands (*r*).

In the eleventh century, we find a court held on *Pinnenden Heath*, near *Maidstone* in *Kent*, at which not only the men of that county, but of several others, were assembled on the great cause between *Landfranc*, Archbishop of *Canterbury*, and *Odo*, Bishop of *Bayeux* in *Normandy* and Earl of *Kent*, relative to several manors, &c. claimed by the latter; and which continued for three days (*s*).

And, at an earlier period, a county-court is said to have been held at *Eareth* in the same county, when Archbishop *Dunstan* swore that certain lands belonged to *Christ's Church* at *Canterbury*, and *St. Andrew's* at *Rochester*; which oath of *Dunstan* was, as we read, confirmed by the oaths

(*r*) *Spelm. Gloss.* v. *Malloburgium*, & *Whit. Manch.*
ubi. sup.

(*s*) *Vide Eadmer.* 9. & *Seld. Spicileg.* 197.

of a thousand other persons chosen out of *East and West Kent, Essex, Middlesex, and Sussex* (*t*).

And we are told that the celebrated place in this kingdom where the articles of *Magna Charta* were signed by King *John* was denominated *Runemed*, which signified, according to *Matthew of Westminster, pratum Consilii*; because, in ancient times, it had frequently been used for holding great councils of the realm (*u*).

(*t*) *Lamb. Peramb. Kent*, 441—3. tit. *Eareth*, who cites the *Text. Roff.*—Among the Welch we find a mode of trial by *three hundred compurgators*. See the *Stat. 1 Hen. 5. C. 6.*

(*u*) *Ipsa Anno, maximus tractatus habebatur inter Regem & Barones, de Pace regni, inter Stanes & Windesoram, in Campo qui dicitur Runemed, quod interpretatur Pratum Consilii, eò quòd ab antiquis temporibus ibi de Pace regni sæpius consilia tractabantur, &c. Matth. Westm. lib. ii. fol. 73—4. Sub. An. 1215.* And see *Blackst. Introd. to the Great Charters*, pref. xxiii. and *Squire on the Anglo-Sax. Gov.* S. 60. N. 2. p. 173.—The Saxons held councils in the open air. “*Sub Dio,*” says *Edgar* in his Charter to *Ely Abby.* *1 Tyr. Introd. civ.*

For the convenience of shade and shelter, however, assemblies were frequently held under trees. "GÄNGLER demanded," says the EDDA, "which is the capital of the gods, or the sacred city? HAR answers, It is under the ash YDRASIL; where the gods assemble every day and administer justice (*x*)."

The circumstance of assembling under trees was long prevalent among the *Gothic* nations. "The states of *East Friesland*," says *M. Mallet* (*y*), "so late as the thirteenth century, convened under three large oaks which grew near *Aurich*. And it is not more than three centuries ago," he adds, "that most of the *German* princes held their conferences under trees."

In this kingdom also, the custom prevailed: AUGUSTINE, in the time of *Ethelbert*, summoned the *British* bishops to a

(x) *Edda. Fab.* viii.

(y) *North. Antiq.* vol. ii, p. 53. n. (A).

synod at a place called, in *Bede's* time, *Augustine's Oak* (z).

The *Wapentake of Scyre Ake* in the *West-Riding of Yorkshire*, and the county of *Berks*, are supposed to have taken their name from remarkable oaks under which the inhabitants were used, in particular emergencies, to convene, and consult about public affairs (a).

And the ingenious translator of *Mallet* informs us that he knew of a manor in *Shropshire* where the manor-court was held at the time he wrote under a very aged ash-tree; where the steward called over the copyholders and formed a jury, and then adjourned the court to a neighbouring inn for dispatch of business (b). And a similar custom is known to the au-

(z) See 1 *Tyrr. Hist. Engl.* 160. *Sub Ann.* 604. and *Camd. Brit.* in *Worcestershire*, and *Gibson's n.*

(a) *Transl. n.* (***) to *Mall. N. A.* vol. ii. p. 56. and *Camd. in Berkshire.*

(b) *N. (***)* to vol. ii. p. 56.

thor of these pages to have prevailed within other manors in the kingdom.

In the generality of countries, justice was administered in the most public manner. Among the Jews the judges “sat in the gate” of the city; and we are told that the custom continues to this day in various parts of the East (*c*). In the gates
of the city.

The custom is alluded to by *Homer*, and appears to have been practised at *Rome*.

In our own nation we have instances of a similar practice. It seems alluded to, at least, in a law of *Athelstan* (*d*).

The constable of the castle of *Dover* is forbidden, by stat. 28 *Ed. I.* c. 7, to hold certain pleas “*a la porte du chastel*;” which,

(c) See *Clayt. Chron. Heb. Bib.* 481, & *Falc. Clim.* b. i. c. 20. f. 1. p. 112—13. and notes.

Dr. Shaw supposes that the court of the Grand Seignior was called the *Port* from the circumstance of the king’s dispensing justice at the gate among the oriental nations. *Trav.* 253, and see *Falc. ubi sup.*

(d) See *Seld. Tit. of Honour*, part 2. ch. 5. f. 4. p. 515—16.

as the author of “*Observations on the Statutes*” very justly remarks (*e*), should be translated “at the gate,” and not “within” it, as it is usually rendered. And the same learned writer gives us a passage from *La Vie de S. Louis* (p. 13,) wherein are mentioned “*les plez de la porte* (*f*).”

Plaints, too, were frequently heard and determined, and canonical purgation made, at the doors of our churches. Whence it has been conjectured, that such was the cause of the porches of churches being generally builded so spacious (*g*).

Halls.

When the gods, according to the Icelandic mythology, had assembled in the plain of *Ida*, “their first work,” says the

(*e*) P. 164—5.

(*f*) In France it was anciently the custom to present petitions or complaints to the king at the gate of his palace. See *Mill. View of Engl. Gov.* b. 2. c. 3. p. 323.

(*g*) See *Jac. Dict. t. Suthdure.* In the time of *Henry the Sixth*, the south porch was, sometimes at least, appropriated for christenings and weddings. See the Will of *Hen. VI. Coll. of Roy. Wills*, 297, 4to. It was usual also to endow the wife at the church door; “*ad ostium ecclesiæ*.” See *Litt. f. 39.*

Edda (h), “ was to build a *hall*; wherein are twelve seats for themselves, besides the throne, which is occupied by the universal father.” Vestiges of a custom similar to this of twelve seats being erected, whereon the chiefs sat in council or in the dispensation of justice, are frequently met with in most of the northern nations, and even in this island. “ Such, in those rude ages, was the *hall of audience*,” says *Mallet (i)*.

Thus was the *hall* allotted for the administration of justice. *William the Conqueror* established a court in his own *hall*, which was thence denominated *aula regia*, or *aula regis*, and was the supreme court of justice in the kingdom; and in it the king himself, or the *capitalis justiciarius totius Angliae* presided (*k*). It was for this court that *William Rufus* builded *Westminster-hall*.

(*b*) *Fab. VII.*

(*i*) *Nor. Antiq. v. 2. p. 45, N. (c).*

(*k*) *3 Bl. Comm. c. 4. p. 38.*

The great men who had any particular jurisdiction held their courts also in their halls; which, in early days, were the most spacious apartments in their mansions. Hence the term *hall* was frequently applied to a court-baron (*l*); as the word *bre* was among the Welch (*m*). Hence the town-hall, shire-hall, &c.

And it is observable that in many parts of the kingdom, the manor, and, from those, other great houses, are called “*halls*:” as, in other counties, they are denominated “*courts*,” (*n*) most evidently from the court-baron held in them. In some they have the appellation of “*places*,” most probably from the same cause—from *pleas* being there held (*o*).

(*l*) *Vide Spelm. Gloss. voc. Haligemote.*

(*m*) *Ante*, p. 10.

(*n*) Hence too the royal residence or *palace* was called, by way of eminence, “*the court*.” Hence, as *Hottoman* observes, came the common saying, when people went to the king’s *hall* or *palace*, “*We are going to court*;” because they seldom approached the king but upon great occasions, and when a council was called. *Franc. Gall.* ch. x.

(*o*) From *Placitum*. See *Hottom. Franc. Gall.* c. x.

The court-baron was to be held from ^{When to be} three weeks to three weeks (*p*), or, as ^{held.} some think (*q*), as often as the lord chose. And it should seem clear that the lord may hold a customary court as frequently as he pleases (*r*), and compel the attendance of his tenants who hold by villein or base services.

In the supplement to *Coke's Copyholder* (*s*), it is said that the lord is not compellable by his copyholder to hold or call a court to accept a surrender. But it appears sufficiently established that he is compellable, both in equity (*t*) and at law (*u*), to hold a court, if the business of the copyhold-tenant require it.

Pre-

(*p*) *Britt. Cap.* 120.

(*q*) *Co. Copyh.* f. 31. Tr. 50.

(*r*) *Suppl. to Co. Copyh.* f. 3. Tr. 149.

(*s*) S. 3. Tr. 149.

(*t*) *Nels. Rep. in Chan.* 12. *Moor, et al. v. Lord Huntingdon: Dyer,* 264: a. *Roswell's case.*

Lord compellable to hold a *court-baron.* *F. N. B.*
12. D.

(*u*) By *mandamus.* *The King v. Lord Lonsdale,*
Hil. 39 Geo. III.

Previously, however, to an application being made to a court, either of law or equity, a regular demand or requisition should be made by the person or persons interested, praying such court to be held; which, if general, may be to this effect:

Requisition
to hold a
Court.

"To the steward of the manor of *Fairhurst*, in the county of —

"We whose names are hereunto subscribed, being tenants of the said manor of *Fairhurst* by copy of court-roll, do request you to hold a general customary court, in and for the said manor, as soon as conveniently may be; and, in the mean time, to do and cause to be done such matters and things preparatory thereto as appertain to your office of steward; as well that the rights and customs, both on the part of the lord of the said manor,

It is too greatly to be feared that a steward frequently defers holding *general* courts, that the tenant may be induced to request a *special* one; by which an additional fee would be put into the pocket of the said honest man.

and

and of us and others the copyhold tenants thereof, may be recognized and preserved, as also for the dispatch of such other business as of right ought to be done and executed at such general court, and which now appears to us to render the holding of the same with all convenient speed both advisable and requisite.

A₁, B₁

C₆D₂

E_a, F_a

&c."

The holding of a customary court in <sup>Holding a
Court in the</sup> the night, or, at least, after the setting Night, of the fun, has been adjudged good (*x*); though no particular custom for so holding it appears to have been alleged or relied on.

(x) Moore 68. pl. 185.

In the manor of *Kingshill in Rochford*, in the county of *Essex*, a court is said to be held on Wednesday morning next after Michaelmas yearly, at cock-crowing, before it be well light, and which is denominated the *Lawless Court*. See *Cowel & Jacob*, *voc.* *Lawless Court*.

Who shall preside in
the customary court.
Lord *pro tempore.*

Whoever is lord *pro tempore* may hold a court, though he be only a tenant at will (y) : and even if a person who is lord by wrong, as by disseisin, abatement, or intrusion, hold a court, *his ministerial acts* as admission, &c. would be good ; though his grants would not be obligatory on the lord by right, as one person cannot grant the property of another person away (z).

It is said in the *Supplement to Lord Coke's Copyholder* (a), and in Mr. Fisher's *Treatise on the same subject* (b), that a lord cannot hold his court in person ; but in the *Supplement to Lord Coke*, and who was the author of that supplement is, I believe, not known (c), no authority is referred to ; and it certainly is no authority in itself ; and in the latter work, reference is only made to what was urged

(y) See *Ante.* vol. i. ch. 2. Of Grants. p. 24. &c.

(z) See *Ante.* vol. i. p. 28. 74. 255.

(a) S. 3. Tr. 149.

(b) C. 7. p. 48 & 51.

(c) See 3 *Durnf. & East.* 171. *Doe d. Tarrant v. Hellier.*

arguendo in a case in *Dyer (d)*, and which by the way, was only to prove that *a lord could not be his own steward*, or, in other terms, that a person could not be *his own deputy (e)*; which surely does not require any legal *authority* to convince us of—since, as representation must necessarily exclude identity, so identity must necessarily exclude representation.

Besides, it is repeatedly laid down in our books, that, in a customary court, the lord or steward is judge (*f*) ; now surely a person cannot be a judge in a court which he cannot hold. But as it

(d) 70. b. pl. 41. in the case of *Withers v. Ifeham*.

(e) So in *Cholmely v. Morton*, 2 Show. 180. it was held that a mayor, *if owner of a fair, could not be a good steward of it.*

(f) Co. Litt. 58. b. 4 Co. 26. b.

Lord *Coke*, speaking of a steward, (*Copyh. S. 45. Tr. 102.*) says, “he representeth the lord’s person in many employments: for, IN THE LORD’S ABSENCE he sitteth as Judge IN COURT, to punish offences,” &c.

“ If a LORD in OPEN COURT doth grant,” &c.
Calth. 47.

is acknowledged that the lord may be a judge in a customary court, it should seem to follow of necessity, that he may hold it himself if he pleases.

Lord sits as
chancellor.

But the lord has not only a legal, but an equitable authority. He sits in his court as chancellor, and “may redress matters in conscience, upon bill exhibited, where the common law will afford no remedy in the same kind (*g*).”

Thus, if I surrender to *A*, in trust to raise a sum of money, and the money be raised, and I require him to re-surrender to me, and he refuse; I may exhibit my bill, on which the lord may decree against *A*, that he surrender; and if *A* refuse, the lord may seize and admit me (*h*).

This mode of petitioning the lord was

(*g*) *Co. Copyh.* S. 44. p. 100—1. See *Ante.* vol. i. p. 8. & 90. N. (*t.*) *Watk. Introd. to Gilb. Ten.* xii. *Moore* 68—9. *pl. 185. Co. Litt.* 60. *a.*

(*b*) *i Leon.* 2. *pl. 2.*

frequent

frequent in earlier days (*i*), when the Court of Chancery was not so established as it is at present. Nor is the petition to the lord by any means useless at this day: for as a writ of false judgment will not lie on the decision of this court (*k*), it is, in some cases, the only remedy which the copyholder can have (*l*).

But the lord need not hold his court ^{Steward.} himself, he may appoint a steward to hold it for him; and he need not retain such steward by deed: it will be sufficient if he retain him by parol (*m*). Though, in the case of the King, or in that of a corpora-

(*i*) As matters of curiosity, copies of two “Englishe Bills,”—one preferred to the steward in the time of *Henry the Eighth*, and the other to the lord in the 43d of *Elizabeth*, will be given at the end of this chapter: and for which the author is indebted to the friendship of the Rev. Mr. *Corfellis*, lord of the manor of *Wivenhoe*, and the ingenious Mr. *B. Strutt*, of *Colchester*.

(*k*) *Moore*. 68. pl. 185. *Co. Litt.* 60. a. *F. N. B.* 12. *B.*

(*l*) See, Of reversing a recovery, *Ante*, vol. i. p. 162. *N.* (*i.*)

(*m*) *Co. Copyh.* §. 45. Tr. 104.

tion,

tion, it would be proper, if not necessary, to retain him by patent or deed (*n*).

And even if a person has only a reputed or ostensible authority as steward, though in reality he have no regular appointment, yet what he does *ministerially* in court shall never be questioned; but he ought to have a legal and regular authority to grant (*o*).

But if a stranger, without the appointment of the lord or consent of the right steward, or without any colour of authority, will, of his own head, come into a manor and keep a court, it seems, says Lord Coke (*p*), that the performance of any judicial act, or the executing of any act whatever, will not be warranted, especially if the court be kept without warning given to the bailiff by precept, according to the custom,

(*n*) *Co. Copyb.* S. 45. Tr. 104—5.

(*o*) *Ante*, vol. 1. p. 29.

(*p*) *Copyb.* S. 45. Tr. 105.

For there is a difference, as justly observed in *Moore* (*q*), between a steward who has colour but no right to hold a court, and a person who has neither colour nor right; for if one who has colour assemble the tenants, and they do their services, the acts of such person are good: as in the cases of an under-steward, where the chief steward is dead; or the clerk or secretary of the lord of the manor who holds a court without the contradiction or disturbance of the lord, though he have no patent nor express authority from the steward; and the reason is, because the tenants are not obliged to examine whether the authority of the steward be lawful or not, nor is he obliged to render any account of it to them.

So if two persons be appointed *joint-stewards*, a court held by one only will be good (*r*).

(*q*) *Moore*. 112. in *Knowles v. Luce*.

(*r*) *Knowles v. Luce*, *ubi sup.*

Under-Stew-
ard.
So a steward may depute or authorise another to hold a court; and the acts done in a court so holden will be as legal as if the court had been holden by the chief-steward in person. So an under-steward may authorize another, *pro hac vice*, to hold a court for him (s).

Manner of
holding a
customary
court.

Notice:

When the time for holding a general court is determined on, the steward should give public notice where and when it is to be held; and issue out his precept to the bailiff or beadle of the manor, commanding him to summon the several tenants who owe suit, that they personally appear.

For no *forfeiture* of the copyhold shall occur by reason of non-performance of suit, unless the copyholder be *personally* warned: a *general* notice will not be sufficient (t). But it should seem that if a

(s) Knowles *v.* Luce, *ubi sup.* 1 *Leon.* 288. Lord Dacre's case. 1 *Salk.* 95. Parker *v.* Kett. *Comyns's Rep.* 83. S. C. & *Ante*, v. 1. p. 29—30.

(t) *Ante*. v. 1. p. 330.

copyholder *resident within the manor* do not appear or esjogn on a general notice in writing affixed to the door of the church or churches or other place of notoriety within the same manor (*u*) ; and especially if the court be held on a certain day, by custom, as on *Michaelmas* or *Lady Day* in each year, that he may be amerced for non-attendance (*x*), though *no forfeiture* can incur.

According to the report of *Taverner v. Cromwell*, by *Croke* (*y*), four days notice was held to be sufficient. But it would be proper to give at least ten or fourteen days ; and, especially, if the manor be of considerable extent.

If the court to be held be merely a general customary court, the notice may be to the following effect :

Manor of } “ Notice is hereby given that
Fairhurst. } the next general customary

(*u*) See *Co. Entries*, 288. a. *Taverner v. Cromwell*.

(*x*) See 3. *Bulst.* 80—1. *Belfield v. Adams*.

(*y*) *Cro. Eliz.* 353.

court of the right honourable — Earl of —, lord of the manor of *Fairhurst* aforesaid, will be held in and for the said manor, in the hall of the manor-house, on *Thursday*, the day of next; when and where the several customary tenants of the same manor are hereby required to do their accustomed suit.

A. B. Steward."

Dated this day
of 17 &c.

Stile of the court.

Previously to the court being held, the steward should prepare his minute-book ; and the first thing to be attended to in it is the stile of the court.

The stile of the court is often inaccurately entered : it is not uncommon to find a customary court entered as a court-baron, though it was previously known that no freeholder would nor could attend (z).

If

(z) In ancient rolls we frequently find the entry to be that of "A COURT," generally, without more ; sometimes,

If the court be intended merely for copyhold purposes, the stile should run thus:—

Manor of } “A general [or special] *custio-*
Fairhurst. } *mary* court of the right ho-
nourable — Earl of —, lord of
the manor of *Fairhurst* aforesaid, held
in and for the said manor, on the
day of in the year of our lord,
&c. before A. B. Esq. chief steward of
the manor aforesaid.”

If a court-baron be held with a customary court, it would be the safer way not to mention expressly before whom the several courts are held, but to state the persons generally; and so leave it to the law, which will consider the proper busi-

sometimes, “The First Court,”—“The Second,” &c. of the then lord.

“ *Curia R. F. C.*” *Kich.* 53. b.

“ *Prima Curia. T. F. Gen: Dm: Manerii pd:*
ibm:” &c.

“ *Ad primam Cur.*” &c.

ness

ness of each court to have been transacted before the regular judges (*a*). Thus :

Manor of } “ A court-baron and general
Fairhurst. } customary court of, &c.

Present, *A. B.* Esq. chief steward of
the said manor.

C. D. }
E. F. } Free-suitors: fworn.
G. H. }
&c. }

I. K. }
L. M. } Copyhold tenants:
N. O. } fworn.
&c. }

Q. R. Beadle, &c.”

Opening of
the court.

When the steward takes his seat, the bailiff is to announce that the court is sitting, and enjoin silence. He then must make the usual proclamation, requiring all persons who owe suit to appear or make essoign.

(*a*) *i Freem.* 525. *Ca.* 707. & see *Watk.* No. LXXXIX. to *Gilb. Ten.* 433.

The

The names of the suitors are then to ^{Suiters called.} be called over; and their appearance, *Eſſoign*, or non-appearance, recorded.

To make *Eſſoign* is to justify the non-*Eſſoigns*. attendance of the person owing suit, by alleging some excuse, as that he is ill, &c. and this *Eſſoign* may, from the very nature of the thing, be made by attorney (b).

The suitors (c) who appear should then ^{Homage} be sworn on the homage. The foreman ^{sworn.} should be first chosen, and sworn: and the oath may be thus:

“ You, A. B. as foreman of this ho- ^{Oath.}
mage, shall truly present all such matters
and things as are presentable at this court,
as the same are already known to you, or,
during the sitting of this court, shall come
to your knowledge. You shall present
nothing out of malice, nor conceal any
thing from favour or affection; but, in all

(b) i. *Leon.* 104. Sir J. Braunche's case.

(c) Who are suitors, &c. See *Post.* chap. vii. Of Suit.

things, present the truth, the whole truth, and nothing but the truth, according to your information and belief. So help you God."

Then swear the others, by two or three at a time, according to the number present.

" You, and each of you, shall," &c. as before.

If any suiter being present refuse to be sworn on the homage, it will be a forfeiture of his copyhold *ipso facto* (*d*).

Plaints.

When the homage are sworn, let proclamation be made for those who have plaints to enter them.

(*d*) *Co. Copyh.* S. 57. Tr. 132.

If a *Quaker*, however, refuse to be sworn, merely *on account of the oath*, it should seem that equity would prevent a forfeiture. See *Ante.* vol. i. p. 353. But if there be not a sufficient number of suitors present to make an homage, as required by the custom of the manor, his *affirmation* may be taken; and if he refuse his affirmation, he would not, I think, be entitled to the protection of the court.

Copyholders

Copyholders shall neither plead nor be impleaded for the tenements which they hold by copy, by the king's writ; but shall have their plaints in the nature of the several actions at common law (*e*).

If, however, any dispute arise between lord and tenant, it must, of necessity, be referred to the courts above; as the lord must not be both party and judge (*f*).

The plaint in the customary court is ^{Form of the} thus entered: “*A. B. complaius against C. D.* of a plea of land, to wit, of one mes-
suage, forty acres of land, &c. with the appurtenances; and makes protestation to follow his plaint in the nature of the king's writ of assize of *Mortdancetor*, at the common-law;” or “of an assize of *Novel Disseisin*;” or “*Formedon* in Descender at the

(*e*) *F. N. B.* 12 B. *Litt. S.* 76.

(*f*) See. 1. *Salk.* 56. *Baker v. Wicb*, & *Ibid.*
185. *Brittle v. Dade*, & *Ante.* p. 1—2.

common law ;" or in the nature of any other writ, &c. (g).

Pledges to prosecute ;
John Doe and Richard Roe.

Formedon.

But if a donee in tail bring a plaint in the nature of a *Formedon*, he ought to count of the gift made by the copyholder who surrendered, and not by the lord ; for the lord is only an instrument of conveyance ; and nothing passes from him (h).

In the *Per.*

So if a plaint in the nature of a writ of entry in the *per* be brought, it shall be

(g) *Litt.* S. 76. *Co. Copyb.* S. 51. *Tr.* 118.

As a Writ of Entry *en le Post*. *Moore* 68. *pl.* 185.—in the *per Co. Copyb.* S. 41. *Tr.* 91.—So before the statute 32 Hen. VIII. C. 28. in the nature of a *Cui in Vitâ*. *Dyer*, 264. a. *pl.* 38. *Roswell's case*. But it has been said that that statute extends to copyholds ; (*Cro. Car.* 43), and, if so, a plaint in the nature of a *Cui in Vitâ* is become unnecessary. See *Watk. Gilb. Ten.* 109. *& post Ch.* x.

In the nature of a writ of *Dower*. 4 *Co. 30. b. Shaw & Thomson*.—Or of a writ of *Aiel*. 2. *Freem.* 106. *Knight v. Adamson*. But quære whether a plaint in the nature a writ of *Mortdancestor* ever lay of Copyholds. See *Watk. Gilb. Ten.* 287. N. z.

(h) *Cro. Eliz.* 361. *Paulton v. Cornhill, & al'*.

supposed

supposed in the *per* by the copyholder, and not by the lord (*i*).

But it should seem that plaints in the Limitation, customary court must be brought within the time prescribed in the statutes of limitations for bringing the several writs at common law (*k*). the doubt I expressed
in my opinion
on case 12 Apr.
1803. ~~is~~

If a copyholder make a lease of his Ejectment copyhold, either by deed or parol, and that whether with licence or without (*l*), and his lessee be ousted, an ejectment will lie in the common law courts; because the lease is a common law, and not a copyhold, interest (*m*).

But it is said that such lessee may be sued by plaint in the lord's court for waste

(*i*) *Co. Copyh.* S. 41. Tr. 91.

(*k*) See *Moore* 411. *Shaw v. Thompson.* *Gilb. Ten.*
178. *1 Vern.* 195. *Lyford v. Coward.* 2. *Freem.* ¹⁰⁶ *Koc.*
Knight v. Adamson.

(*l*) See *Watk.* No. XCII. to *Gilb. Ten.* 436.

(*m*) 1. *Leon.* 328. *Cole v. Wall.* *Cro. Eliz.* 224.
S. C. *Co. Copyh.* S. 51. Tr. 119, 120.

done by him to the premises demised (*n*). Yet quære as to this, as *the lessee is not a copyholder*.

As an ejectment will not lie after twenty years, if the copyholder has been more than that period out of possession, he must still therefore have recourse to his plaint in the nature of the several real writs at the common law.

Error, how redressed.

If an erroneous decision be made in the customary court, the party grieved shall not have a writ of false-judgment, but must sue to the lord by petition (*o*).

Though it has been laid down that, if an erroneous judgment be given in such court on a plaint in the nature of a *Formedon*, a bill may be exhibited in Chancery in the nature of a false judgment to reverse it (*p*). And in the case of *Ash v. Rogle*

(*n*) *Co. Copyb.* S. 51. Tr. 119. *Kich.* 84. b.

(*o*) See *Ante* p. 24—5.

(*p*) 1 *Roll. Abr.* 373. *Chancerie (M)* pl. 2. *Patentshall's case*.

and

and the Dean and Chapter of St. Paul's (*r*), the Lord Chancellor said "If there had been an error in any **ADVERSARY** proceedings in the Lord's Court, this Court would have ordered the Lord to proceed and examine it." Though he dismissed a bill praying relief against *a common recovery* suffered in a customary court, though the errors were apparent, and his dismissal was affirmed in the Lords (*s*).

We have repeatedly noticed that **Recoveries** arc frequently suffered in the **Customeary Court** (*t*) ; but fines are seldom **Fines**. levied in them. And yet it would seem that a person permitted to sue out his *plaint and proceed to judgment*, might also be suffered to *compromise his suit* (*u*) : for it

(*r*) *1 Vern.* 367.

(*s*) *Show. P. C.* 67. *Smith & Ux. v. Dean and Chapter of St. Paul's and Rogle.*

(*t*) See the manner of suffering them, *Ante. vol. 1.*
p. 161, 2.

(*u*) See *Hargrave's No. 1. to Co. Litt. 121. a.*

COURTS.

is not essential to the efficacy of a fine that it be levied in a *Court of Record* (*x*).

In the report of the case of Hunt and Bourne, by *Salkeld* (*y*), it is said that the 18th *Edward I.* “ was made to rectify a mistake (*a*), viz. that fines were leviable in inferior courts upon bills or plaints, which now cannot be, either by grant or custom, by reason of the negative words of that statute.” But it is observable that neither the statute of the 18th *Edw. I.* (*b*) nor that of the 27th *Edw. I.* (*c*), nor even the *Second Institute* (*d*) speaks of fines levied “ *in inferior courts*,” but only in those of

(*x*) 1 *Salk.* 340. *Hunt v. Bourne*.—*Com. Rep.* 93, 124, &c. S. C.

(*y*) *Ubi. Sup.* But *Comyns* give the assertion about to be noticed to *Powell*, J. only. (*Rep.* 126.) And in Lord *Holt*’s own statement of his argument, which the author has seen, and which is still extant in his Lordship’s hand-writing, no such assertion appears to have been made by Lord *Holt* at least.

(*a*) See 2 *Inst.* 513.

(*b*) *Stat.* 4. *Modus levandi Fines*.

(*c*) *Stat.* 1. *C. I. De Finibus levatis*.

(*d*) 513.

the king (e) : and it is acknowledged in Hunt and Bourne that the statute *De modo levandi fines*, does not extend to courts in ancient demesne.

Should a fine, however, be levied in a Customary Court, it would not bar an estate tail (*f*) any more than a fine levied in a court of ancient demesne would be a bar (*g*), as it would not be within the statute of the 4th of *Henry the Seventh*. And such, perhaps, is the reason why the levy-

(e) “*Et fait assavoir qe Ordre le Ley ne suffre mie qe finale accorde soit leve en LA COURTE LE ROI saunz Brief Original,*” &c. 18 Ed. I.

“*Quia Fines IN CURIA NOSTRA LEVATI,*” &c. 27 Ed. I.

Without an original writ, indeed, there can be no suit depending in *the King's Court*, and, of consequence, no compromise or “final accord” of such suit; as a suit cannot be compromised before it exist. But a suit in *a Customary Court* is founded upon a *Plaint*, as much as a suit in the King's Court is founded upon a “Writ Original,” and it should, therefore, seem that it may be equally compromised or accorded. See 3. *Blackst. Comm.* ch. 18. p. 272, 3.

(f) *Cruise on Fines* 175, 192.

(g) Hunt & Bourne; *ubi sup.*

ing fines in a Customary Court is now disused. Though it is supposed in *Cruise* (*h*), that a fine levied in a Customary Court may be a bar to an entail *by special custom*.

Present-
ments.

When the several plaints are entered and disposed of, the homage are to make their presentments; as that since the last court *A. B.* died, seized of a certain copyhold tenement, and that *C. B.* is the next entitled (*i*); or that *E. F.* had surrendered out of court (*k*); or that *G. H.* had been convicted of felony, &c: whereby his copyhold became forfeited (*l*); or the like.

And if a copyholder be sworn on the homage, and wilfully refuse to present, on sufficient evidence being given, he shall forfeit his copyhold *ipso facto* (*m*).

(*b*) *Cruise on Fines*, 175, 192.

(*i*) See *Ante.* vol. i. p. 232.

(*k*) See *Ante.* vol. i. p. 79, 82.

(*l*) See *Ante.* vol. i. p. 346, &c.

(*m*) *Co. Copyh.* S. 57. - *Tr.* 132. 3 *Leon.* 109. Sir Christopher Hatton's case, cited as so adjudged; & *Ante.* vol. i. p. 330.

On the different facts being presented, the regular consequent proclamations must be made, as for the next heir, or person having right to the tenements of which *A. B.* died seized; or the person to whose use *C. D.* had surrendered certain other tenements, &c. to come in and be admitted, &c. (n).

Surrenders are then taken; admissions ^{Surrenders,} and grants made; licences given, &c. The whole proceedings being noted by the steward in his minute-book, which both the steward and homage should sign for the satisfaction and safety of all parties. The court is then dissolved by formal pro- ^{Minute book.} ^{Dissolution of the Court.} clamation.

As soon as conveniently may be after ^{Rolls.} the dissolution of the court, the proceedings are to be entered at length upon the court-rolls of the manor, by a copy of which the tenant is to hold.

And *Calthorpe* (o) goes so far as to say that if the Lord in open court doth grant

(n) See *Ante*, vol. i. p. 231, &c.

(o) *Readings*, 47.

copyhold land, and the steward make no entry thereof in the court-roll, it is not good, though it be never so publicly done; and no collateral proof can make it so.

But though there must, of necessity, be an entry on the court-roll before there can be *a copy of that entry*, yet, if a grant be made, either in or out of court, and not entered, there can be no doubt but that the regular entry may be compelled.

It is acknowledged, however, by *Cal-thorpe* (*p*), that though there must be an entry on the roll, yet it is not of necessity that there be a copy of that entry actually made; for if the tenant have no copy, or if he lose it, yet the roll is sufficient title for his copyhold.

If the roll be lost, it seems, says the last-quoted writer (*q*), that by proof he can make it good. And as surrenders made out of court are generally kept by the

(*p*) *Readings*, 47.

(*q*) *Ibid.*

Lord, or the stewards who are often changed, they may frequently be lost without any fault or negligence of the party, so they may, on certain considerations, be presumed or supplied when they do not appear upon the rolls (*r*).

The rolls, being not of record, are no ^{May be} estoppel; and, therefore, if an erroneous ^{amended.} entry be made, they may be amended (*s*). And it was held by Lord *Hardwicke*, in the case of *Car v. Ellison* (*t*), that, though the declaration of the uses of a surrender was not inserted in the court-rolls, but only indorsed on such surrender by the steward, it was enough.

If there be any cause or proceeding in- ^{Inspected by} stituted (*u*) by one tenant of the manor ^{the tenants.}

(*r*) See 1 *Vern.* 195. *Lyford v. Coward.* 2 *Freem.* 106. *Knight v. Adamson.*

So the Steward's draught of admittance was held by *Holt*, C. J. to be good evidence. 1. *Lord Raym.* 735.

(*s*) See *Ante.* vol. i. p. 89. & 1. *Leon.* 289. *Burgess v. Foster.*

(*t*) 3. *Atk.* 73.

(*u*) 7. *Durnf. & East.* 746. *The King v. Allgood.*
against

against another (*w*), or by a tenant against the lord (*x*), the courts both of law (*y*) and equity (*z*) will order that the tenant be permitted to inspect and take copies of the court-rolls, paying the accustomed fees (*a*); and compel the person in whose hands they are, though he be not the lord or steward, but a stranger (*b*), to produce them at a trial.

Are evi-
dence.

For though the court-rolls are not matters of record, so as to estop the parties from giving the truth of the facts in evidence, yet they are, in themselves, evidence, *prima facie*, and entitled to credit (*c*).

(*w*) 2 *Ves.* 578. *Anon.* 2 *J. Blackst. Rep.* 1061. *Folkard v. Hemet & al.* 12 *Vin.* 146. *Evidence* (F. b.) pl. 8.

(*x*) 2 *Ves.* 621. *Anon.* 2 *J. Blackst. Rep.* 1030. *Addington v. Clode.*

(*y*) 3 *Durnf. & East.* 141. *The King v. Shelley.*

(*z*) See the books cited in 6 *Vin.* 183. *Copyh.* (Y. d.) 2 *Ves.* 578. 621.

(*a*) *Finch's Rep.* 249. *Draper v. Zouch.*

(*b*) 2 *Ves.* 578.

(*c*) *Bull. Nisi Prius*, 247. 5 *Durnf. & East.* 26. *Roe d. Bebee v. Parker*; & see 12 *Vin. Abr.* 105 & 214. *Evid.* (A. b. 28). (T. b. 24.)

If a copyholder forge a customary to the Forging rolls. injury of the lord, it will be a forfeiture of his copyhold (d).

And if the steward show a court-roll to Destroying a copyholder, to prove that the land is holden by copy, and the copyholder tear them. the court-roll in pieces, alleging his lands to be free, he shall forfeit his lands so held by copy (e).

(d) *Ante.* vol. I. p. 334.

(e) *Ibid.* 333.

PETITIONS.

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(*b*) 2 *Ves.* 578.

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(d) *Ante.* vol. I. p. 334.

(e) *Ibid.* 333.

PETITIONS.

PETITIONS.

No. I.

In temp. Henry VIII.

Master Steward I beseke you only by
 petition as to be so good to me you' poore
 Oratour Wyllm Albert and Jone my Wife
 as to charge you' Tennaunts being here of
 my lords corte of Wivenho for to loke out
 the ryght eyer of the Tenament cavled
 the hartshorne w^t th appertennaces lying
 w^t in the sayd parryshe aforesayd and so
 that they maye shewe and to sett in the
 sayd ryght eyer be the vertu of ther othe
 (and yf you do so mytche for me vnto my
 poore Ablilyte I shall se you rewardid)
 And yf that I am not Abyll to do you
 pleasure in nothyng that I can do y^t I
 shalbe Bounde to praye for you' most
 pſperous welfare and lyfe the whyche I
 praye God prefarve and long to continewe
 vnto hys blefsyd pleasure Amen

No. II.

No. II.

*Sarah Purdue Englishe bill ex-
hibited 8° Octob. a° 43. Eliz.*

To the right Worshipfull Robert Townfend
Esquier Lord of the Manno^r of Wyven-
hoe in the County of Essex.

Humbly sheweth vnto yo^r worship yo^r
poore and dayly oratrix Sara Purdewe of
Wyvenhoe in the said County That
whereas Willm Purdewe deceased Grand-
father vnt: yo^r said Oratrix about XL or L
yeres past was lawfully seised in his demesne
as of ffee at the will of the Lord according
to the Custome of the said Manno^r of &
in one Messuage or tente & certayne lands
medowes & pastures called Thurstons &
of & in one other Messuage or Tente &
certayne lands called Scarletts And the
said Willm Purdewe so being seised of the
p'misses about the tyme aforesaid made (f)
his last Will in wryteing & therby did

(f) In the original, the words "a surrender thereof
according to the custome of the said manor to the use
of his last will & testam^t and about that tyme also
made," are struck through with a pen.

PETITIONS.

devyse the said lands & tente called Thurstons to one Richard Purdewe one of his younger sonnes vpon condicon that he shold truly pay vnto Margaret Chapman his daughter for her advancement in mariage the some of six powndes & also to the Church of Wyvenhoe three powndes And did by the same Will give vnto one Johane Quicksley his daughter the other lands & tents called Scarletts upon Condicon that she shold pay vnto Alice Curtis his daughter the some of fyve powndes as by the said will doth and may appere. And afterwards the said Richard & Johane were admitted to the p'misses & did enter into the same accordingly But so it is if it may please your Worship that although there were a Will made to the purposes aforesaid Yet the truth is & so you^r said Oratrix doubteth not but she shall be able sufficiently to pve that there was no good and sufficient surrender made of the p'misses to the vse of the said Will according to the Custome of the said Man-
nor^r And further faith that the truth is also that if any such Surrender was made yet that the said sevall somes of money

nor

nor any of them were truly paid to the parties aforesaid according to the true intent & meaninge of the said Will by reason whereof all the said lands & tents & the right title & interest thereof did descend & come & of right doe appertaine & belongeth vnto you^r said poore Oratrix that is to say as daughter & sole heire to James Purdewe sonne & heire of the said Willm Purdewe And so it is also if it may please you^r Worship that since the death of the said Willm & James all the copyes wryteings & evidences concerning the p'misses by some indirect meanes are lately come to the hands & possessions of one Thomas ffraunces Moyfes Lock & Margaret his Wyfe who by colo^r of having the same have lately vnlawfully entred into the p'misses & contrayred secrete estates thereof to be made to themselves & others to their vse. And although it is comonly reported & very well & notoriously knowne as well amongst most of you^r worships auncient tenants there as to the parties them selves that the p'misses do of right belong unto your^r said Oratrix as aforesaid & not vnto the said Thomas

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Moyses & Margaret And that therepon
yo^r said Oratrix both by her self and her
frends hathe gently requyred them to
deliv^r her the said evidences and to yeld
vnt her quiet possession of the p'misses
according to her iust tyle therunto yet
the same to doe they have vtterly refused
& yet doe deny the same against all right
equity & conscience In consideration
whereof & forasmuch as yo^r poore
oratrix cannot for want of the dates &
contents of the said evidences and for that
also she is both voyd of money & frends
& therfore altogether vnable to move or
sustayne any tedious futes at the comon
lawe or by plaint in yo^r Worships Cort &
like to be disenherited for ev^r vnles by
yo^r Worships good meanes some speedy
order be taken in that behalfe that it may
please yo^r worship in tender regard of the
p'misses to direct yo^r p'cept in the nature
of a subpena to the said Thomas Moyses
& Margarett comanding them therby at a
certayne daye & vnder a certayne payne to
appeare before yo^r Worship as chancelo^r in
yo^r own court & to make playne & direct
answer to the p'misses & to stand to &
abide

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abide such further order therabout as to
yo^r Worship & you^r Steward shalbe thought
to stand wth right equytye & conscience
And yo^r poore oratrix shall dayly pray for
your Worships helth and pspitye

E. Mydleton.

E 3

CHAP.

CHAP. II.

OF CUSTOM.

What.

BY Custom is here meant the law of a particular precinct, district, or territory, unwritten, and dependent only upon im-memorial usage.

The general doctrine of these local cus-toms has been so frequently and clearly laid down in many of our books (*a*), that it would be needless to go at length into it. I shall, therefore, content myself with briefly tracing its outline, except where those authors shall not appear to have been sufficiently minute.

(*a*) *Davys's Rep.* 31. b. *Cafe de Tanistry.* 1 Bl.
Comm. Introd. f. 3. p. 74. *Co. Copyb.* f. 33.

And,

And, in the first place, a custom is always *local*. It is contradistinguished from a *prescription*, which is *personal*; and from the *common-law*, which is *universal*. The usage of a certain *manor* is a *custom*: a right alleged in a certain *person* and his ancestors, or those whose estate he has, is a *prescription*; and the usage of the *whole realm* is the *common-law*.

It is essential to a custom that it be *immemorial*. If the time of its commencement can be shown, or if it can be proved that it did not once exist, it is insupportable as a custom.

Requisites of
a custom:
Must be im-
memorial;

It must, with respect to the *right*, though *uninterrupted*; not with respect to the exertion of that ^{ed;} right, be of *uninterrupted continuance*.

It must have been always *peaceably accepted*; *peaceable*; *quiesced in*.

It must not be *unreasonable*: not *contrary to the law of God*, or involving an *absurdity in itself*.

certain; It must be *certain*: not ambiguous, indefinite or vague,

compulsory; It must be *compulsory*: not dependent upon option or will,

^{not incon-}
^{fistent with}
^{another cus-}
^{tom;} It must not be *inconsistent with another custom*; though it may be subservient to another's right (*b*). So a custom shall not be allowed against the king's prerogative (*c*); which, in the consideration of the law, must be equally ancient as the custom alleged; and where the right of the king and the right of the subject oppose each other, the right of the subject must give way,

Trial; The existence of a custom shall be tried by a jury of the county in which the manor or place lies wherein it is alleged, and not by the judges; except the same

(*b*) See 5 *Durnf. & East.* 411. *Bateson v. Green & al.*—So one custom may be pleaded against another where both may stand together. 1 *Just. Blackst.* 49, *Kinchin v. Knight*.

(*c*) *Davys.* 33. b.

particular

particular custom has been before tried, determined, and recorded in the same court (*d*).

The general (*e*) customs of Gavelkind *Proof*. and Borough-English are noticed by the law; but the existence of other customs must be specially pleaded (*f*); as customs are always considered as particular exceptions to the general rule (*g*).

Hence is it an established rule that the proof of a custom always lies upon him who alleges it (*h*); and it is not only necessary that he prove that the alleged cus-

(*d*) 1 *Bl. Comm.* 76.

(*e*) See *Robins. Gav.* b. 1. c. 3. p. 38.

(*f*) 1 *Salk.* 243. *Clements v. Scudamore.*

But the Court of Chancery will not put persons to set forth a custom with so much exactness as is requisite at law, or with so much nicety as the Court of Exchequer expects. 2 *Atk.* 190. *Dean & Chapter of Ely v. Warren.*

(*g*) *Watk. N.* LXXIII. & LXXVIII. to *Gilb. Ten.* 414—417.

(*h*) 1 *And.* 192. *Evers v. Astwicke. Rob. Gav.* c. 4. p. 38,

tom exist, but also that the lands in question are within or subject to that custom (*i*).

Evidence.

The best and most direct evidence of a custom is that of a series of entries in the court-rolls (*k*) ; and, indeed, even a single entry has been admitted as sufficient evidence as to a descent (*l*). So an ancient presentment by the homage of the customs entered upon the rolls, though no instance was adduced of any person having taken under it (*m*), and an ancient writing, purporting to be such a presentment or customary of the manor, delivered down with the court-rolls from steward to steward, though never entered in the rolls nor signed by any one, have been received (*n*).

When, however, it is attempted to establish a custom by *parol*, it should seem to

(*i*) 1 *Bl. Comm.* 76. *Hob.* 286. *Roberts v. Young.*

(*k*) See *ante.* vol. i. p. 306.

(*l*) 3 *Wils.* 63. *Doe & Mason v. Mason.*—Being no contradictory instances there.

(*m*) 5 *Durnf. & East.* 26. *Roe v. Parker.*

(*n*) See 1 *Durnf. & East.* 466. *Denn v. Spray.*

be necessary to give proofs of its being *put in ure* (*a*).

But the customs of one manor cannot be received in evidence to prove or explain the customs of another (*p*); unless, indeed, in the case of an usage which is common to a whole country or district; as that of the border-lawes (*q*), or the customs of miners (*r*): though these last are properly the customs of such country or district, rather than of the particular manor in question *as that particular manor*.

We have already observed that a custom is regarded as an exception to a general rule; whenever, therefore, that excep-

Customs taken strictly.

(*a*) See 4 Leon. 242. *Ratcliff v. Chaplin*;—& compare with 5 Durnf. & East. 26. *Roe v. Parker*.

(*p*) 1 Strange, 659. *Duke of Somerset v. France*.
2 Atk. 189. *Dean and Chapter of Ely v. Warren*;
& 5 Durnf. & East. 30. in *Roe v. Parker*; & see
Cowp. 807. *Furneaux & Hutchins*.

(*q*) 5 Durnf. & East. 31.

(*r*) See 2 Atk. 189. *Dean & Chapter of Ely v. Warren*.

CUSTOMS.

tion ceases, the general rule must prevail. The impolicy of a diversity of rules, and the consequent necessity of a certain standard, must be immediately apparent. Hence every special custom is to be taken strictly.

Borough-
English;
as to colla-
terals;

If the custom of a manor be that the youngest *son* shall succeed as heir to his parent, he shall do so: but this custom says nothing about the succession of a younger *brother* or *nephew*. The brothers or nephews, therefore, must succeed according to the direction of the general law (*s*).

as to lineals.

But it should seem that, though the custom shall not extend to *collaterals*, or in the *transversal line*, that it, nevertheless, shall hold in the *lineal* descent; and, consequently, that the issue of a younger son shall be preferred, in the descent of Borough-English lands, to the issue of the eldest (*t*). So, if the custom be that the eldest daugh-

(s) *Rob. Gov.* b. 1. c. 6, p. 93.

(t) 1 *Pr. Wms.* 63. *Clements v. Scudamore.*

ter shall inherit, and she die in the life-time of the father leaving issue a daughter, such issue is within the custom and shall take place of her aunt (*u*).

So if the custom be that the lands of every *tenant of the manor, dying seized*, shall descend to the youngest son, or to the eldest daughter; and the ancestor never was a *tenant of the manor*, or did not *die seized*, the descent cannot be within the custom. Thus if a tenant of the manor die seized of such lands, without issue, but leaving nephews and nieces (the children of his brother), the custom shall not extend to *them*; for they must make out their claim or pedigree through their father, who was never a *tenant of the manor*, and consequently could not have died seized; and, besides all this, they claim as **COLATERALS** of the last *dying tenant*; and, consequently, without the custom in that respect also (*x*).

(*u*) 1 Roll. Abr. 623. *Discent. (A) pl. 3. Godfrey v. Bullock.*

(*x*) 1 Durf. & East. 466. *Denn v. Spray.*

Surrenderee. So if a copyholder surrender to the use of *A* and his heirs, and *A* die before admittance, the heir of *A*, according to the common law, shall succeed: because *A* was never a tenant; nor, of consequence, could die seized (*y*). But it was said that it would have been otherwise if the lands had been found to be of the custom of *Borough-English* or *Gavelkind*, which do not require a dying seized.

Cestuy q. trust; Yet it is said (*z*), that a *trust in equity* shall go to the eldest daughter if the lands would have done so: and so of an *equity of redemption* (*a*). But a distinction has been made between trusts *executed* and *executory* (*b*); the latter of which shall be for the benefit of the heir at common law.

(*y*) 1 *Salk.* 243. *Fane & Barr*, cited.

But this case seems scarcely to be reconciled with other decisions. See 5 *Burr.* 2780—1. and the books there cited. *Ante.* vol. i. p. 104. & *Post*, of *Cestuy q. Trust*,

(*z*) 22 *Vin. Abr.* 185. *Uses (D.) pl. 7.*

(*a*) 2 *Ves.* 304. *Fawcet v. Lovther.*

(*b*) *Ante.* vol. i. p. 215.

So if a *remainder* be limited of lands in *Remainder*; Borough-English or in Gavelkind to “the right heirs” of a person, the *eldest* son shall take. For such customs are that the lands shall *descend* to all the sons, or to the youngest of them, and have nothing to do with a *purchase*; and the *remainder* would be taken by *purchase*, and not by *descent*; and, consequently, not being within the custom, it is the province of the common law to point out the person to take such remainder (c). But the *descent* of a *reversion*; *remainder* or *reversion* shall be according to the custom of the manor as to lands in possession (d); for a *remainder-man* or *reversioner* is in the *feisin* of the fee (e).

And it should seem that a *rent* granted *Rent*; out of such customary lands shall follow the customary descent, even though it be a *rent de novo*; *a fortiori*, a rent reserved on a

(c) See *Watk. on Desc.* ch. 5. p. 149. N. & the authorities there cited.

(d) *Ibid.* 153. N.

(e) *Ante.* vol. i. p. 58.

particular estate; as that must follow the reversion (f).

If a rent be *granted out* of such lands and lands at common law, the whole rent shall go to the heir at common law: but if rent be *reserved* on a lease of such lands and lands at common law, it shall be apportioned, and follow the reversion of the lands respectively (g).

Estate pour autre vie;

So if such lands be granted to *A* and his heirs during the life of *B*, and *A* die, living *B*, the customary heir shall take (h).

Child en ventre sa mere.

If a person die seized of Borough-English lands, leaving a son born and another *en ventre sa mere*, the posthumous son shall enter upon his brother, as appears the better opinion (i).

(f) See *Robins. Gavelk.* b. i. c. 5. p. 79. and the books by him cited.

(g) *Ibid.* 84—5.

(h) See 2 *Lev.* p. 138. *Baxter v. Doudswell.* *Salk.* 243.

(i) See *Robins. Gav.* append. 13. & *Watk. on Desc.* ch. 4.

So if the custom be that the eldest daughter shall have the lands after the widow's estate for life, and the tenant leave a widow and two daughters, and the eldest daughter die during the life of the widow, and then the widow die, the youngest daughter shall have the lands; for the widow's estate was a continuation of the estate of the husband, and when that determined by her death the second daughter was the eldest (*k*).

There are some customs, as those of *Borough-English* and *Gavelkind*, which ^{Of customs running with the land.} *run with the land*; so that the lands cannot be discharged of them by fine, recovery, enfranchisement, or escheat, or any other mean than a positive act of parliament (*l*).

But this seems only to hold when the custom relates solely to the *locality* of the

(*k*) *i Lev.* 172. *Newton & Shafto.*

But if the eldest daughter had died, leaving a daughter who survived the grandmother, she should have had the lands *jure representationis*. See *Godfrey & Bullock. Ante.* p. 60—1.

(*l*) *Robins. Gav.* b. 1. c. 5. p. 52.

lands: as if it be pleaded that all lands *within the borough of B.* descend to the youngest son; the lands must for ever remain *within the borough of B.*, whether they escheat or become enfranchised, &c. and, consequently, within, and subject to, the custom.

But if it be pleaded that all lands *held by copy of court-roll, or parcel of,* the manor of *B.* descend to the youngest son, it would be otherwise; for the moment such lands become enfranchised they would, of necessity, cease to be *copyhold*, and *to be parcel of the manor*; and, consequently, without the custom.

The *scite* of the lands cannot be changed; and, consequently, the custom attached to that scite must continue. But a custom attached to *the tenure of the lands* must be gone on the destruction of that tenure.

If the lord purchase a copyhold within his manor or borough, where the custom runs with the land, the descent, it is said,

shall remain as before (*m*). But the consequence of this might eventually be curious. Suppose the manor to descend to the heir at common law, and the purchased lands to the younger son, and the lord die; now the manor would go to one person, and the freehold of the purchased lands to another; and so the demisable quality of the lands would for ever be gone: as the lord could not grant the lands of another person to be held of himself by copy, and the younger son is not lord of the manor to grant. But if the manor and such purchased lands had gone together, the lands might have been granted by copy after the purchase (*n*).

(*m*) See *Robins. Gavelk.* 70—3. & Qu.

(*n*) *Ante.* vol. i. ch. 2. p. 36.

CHAP. III.

OF FREEBENCH.

What.

FREEBENCH is that estate which, by the particular custom of the manor, the widow becomes entitled to, on the decease of the husband, in his copyhold lands and tenements; or that which, in like manner, the husband becomes entitled to on the decease of the wife.

For the term is equally applicable to the estate of the husband as to that of the widow; and anciently it was equally applied to the former as the latter (*a*): though of

(*a*) *Vide Mich. 9 Ed. 3. pl. 44. fol. 38. a. and Robins. Gav. b. 2. c. 1. p. 136.*

So the estate of the husband was called his *dower*. *Vide M. 9 Ed. 3. ubi supra.* And hence *Rastal*, in his Table or Index to *Fitzherbert's Abridgement*, begins the head of Dower with “*Dower par le Courtesy*.”

later

later days the estate of the husband has been denominated his *curtesy*, while the term of *freebench* has been confined to the widow's estate.

On the widow or husband acceding to the estate on the death of the other, such widow or husband immediately becomes a tenant of the manor, and enabled to sit on the homage as one of the *pares curiae*. Hence the widow or husband was denominated *a bencher* (*b*): and hence the etymology of the term (*c*).

But though the term of *freebench* is now confined to *copyhold* property, yet it does not appear how the estate of a *nief* or *villein* could, with any propriety, be called *free*. Nor does it appear that the estate in dower of *freehold* property was ever denominated the widow's *freebench*; for as she held of the *heir*, she did not become

(*b*) See *ante*, vol. i. p. 272—4.

(*c*) Hence also the *bench* of Judges, or Justices, in the other courts: the *King's Bench*, and *Common Bench*, &c.

tenant to the lord, nor, consequently, a *bencher of his court* (as the widow of a copyholder did), except in the instance of her husband's dying without heir; when, of necessity, she must hold of the lord, and may sit in his court (*d*). And in this instance the term of freebench would be applicable to her estate; and perhaps to distinguish it from the dower or *bench estate* of lands of villein tenure, the term of freebench might have been originally appropriated to it; though at this day, by no very uncommon mutation, it is appropriated to a species of tenure which it could not from the very nature of things originally embrace.

Courtesy.

The term of courtesy also appears to have once lost its original acceptation. The estate so denominated was considered by

(*d*) For a woman may sit on the homage in the court-baron to present, &c. See *ante*, vol. i. p. 275. N. (*m*).

Littleton (e) and others as confined to this kingdom; and to exist here by a peculiar favour or *courtesy*. The application of the term, therefore, in the latter acceptation, to the estate which the husband takes in copyhold property must be most evidently absurd; as it is acknowledged that the husband shall not have his courtesy in copyholds, but by *special custom* (f). Now if he can only claim it by the custom of the particular manor, it is clear that he does not accede to it by the *courtesy of England*; since the courtesy of England is the common law of the land, and always distinguished from the usage of a particular place (g). But as it is apparent that the term *courtesy* is, in its ancient and proper sense, synonymous with that of *bench*, and only expressive of the right of the person

(e) *Sect. 35.* So in many ancient statutes the tenant by the courtesy is called tenant by the law of England: “*H̄me q̄ tient PAR LA LEI DE ENGLETERRE.*” *Stat. Glo. 6 Ed. I. cap. 3 & 5. Statutum pro TENENTIBUS PER LEGEM ANGLIE, &c.*

(f) *4 Co. 22. a. & b.*

(g) See *ante*, ch. 2, of Customs, p. 55.

entitled to it to sit in the lord's court, or *curtis* (*h*), as a homager or bencher, it must be equally applicable to the one as to the other.

Taking, therefore, the term *curtesy* in its original acceptation, I shall, notwithstanding, in compliance with the language of the day, consider the customary estate of the widow under the denomination of her *freebench*, and that of the husband as his customary *curtesy*.

And, firstly, then of the widow's estate, or of *freebench*:

Freebench
only claim-
able by cus-
tom.

And here it must be observed that the widow can only claim her freebench by virtue of a *special* custom (*i*); and, consequently, where such custom exists, the estate she is to take must, both as to its quantity and duration, be such as the custom prescribes.

(*b*) See 2 *Black. Comm.* 126. ch. 8.

(*i*) 4 *Co. 22. a. Brown's case; & 30. b. Shaw & Thompson. 460. Litt. 33. a.*

The following observations, therefore, will be chiefly confined to those points in which freebench differs from dower at the common law.

Freebench then differs from dower at the common law in that the former, unless the particular custom declares it to be otherwise (*k*), does not attach even in right till the actual decease of the husband (*l*) ; whereas the right to dower at the common law attaches immediately on marriage, and the widow is entitled to dower in lands of which the husband was

Does not attach till the death of the husband.

(*k*) By the custom of *Thornbury* in *Gloucestershire* and various other manors in the kingdom, the widow shall have her freebench “of all such customary tenements as her husband was at any time seised of during the coverture.”

And note: a dying seized is not essential to entitle the widow to dower of lands in gavelkind, according to the custom of *Kent*. See *Robins. Gav.* b. 2. c, 2. p. 172—3.

(*l*) *Carth.* 275. *Benson & Scott.* 12 *Mod.* 49. S. C. 3 *Lev.* 385. S. C. 2 *Ves.* 633. *Hinton v. Hinton.* 2 *Atk.* 526. *Godwin v. Winsmore.* 2 *Durnf. & East,* 580. the *King v. the Inhabitants of Lopen.* And see 3 *Ves. Jun.* 256. *Brown v. Raindle.*

seised

How defeat-
ed.

feised at any time during the *coverture*, and, consequently, as the dowress becomes entitled immediately on marriage, or, at least, immediately on the husband's becoming seised after marriage, no alienation of the lands by him alone can defeat her right. But, with respect to freebench, it is wholly different. As the right of the wife does not attach, in the case of freebench, till the husband's death, any alienation by him alone, to take effect in his life-time (*m*), though without any concurrence of the wife, whether it be by surrender in court (*n*), by forfeiture (*o*), or

(*m*) For he cannot defeat her claim merely by *devise*; as the devise cannot take effect till his *decease*, when the freebench attaches. See *Co. Entries*, 123. a. 125. a. *Hill v. Hill*. But this must be understood of a devise good by special custom *without a surrender* to will: for if a *surrender* be made (which must be, of necessity, if at all, in his life-time), the claim of the widow will be defeated and gone. See of the relation of the devise to the surrender, *Co. Litt.* 59. b. & *ante*, vol. i. p. 104.

(*n*) *Benson v. Scott*, *ubi supra*.

(*o*) 1 *Freem.* 516. ca. 692.

in consequence of enfranchisement (*p*); the claim of the widow will be effectually and utterly barred (*q*).

And even if the husband make a lease for years, though by license of the lord, the widow shall not avoid it (*r*). But in this case it must be remarked that her claim to freebench is not defeated by reason of the husband's *not dying seized*, (though it should seem to be so urged in some of the books) as he would most indisputably *die seized* in the present instance, *he* being the *copyholder* and not the *lessee* (*s*); and even the possession of the lessee being, at common law, the possession of the lessor (*t*): and, therefore, it should seem that the widow would not in this case be barred only *quoad* the lease;

(*p*) *Cro. Jac.* 126. *Lashmer v. Avery.*

(*q*) See the books referred to in note (*l*), p. 73.

(*r*) *Moore*, 756. *Holder v. Farley.* *Cro. Jac.* 36. S. C. by name of *Farley's Case.* *Coupl.* 481. *Salisbury d. Cooke v. Hurd.*

(*s*) See *ante*, vol. i. p. 301—2.

(*t*) *Watk. on Desc.* 27—48—108—117. *Gilb. Ten.*

and, consequently, be entitled on its ex-piration (*u*).

By special custom, however, the widow shall have her freebench notwithstanding such lease, though without prejudice to it; she receiving the rent, &c. (*x*).

And if the husband contract for the sale of his copyhold, and die without any actual surrender a court of equity will compel the widow to relinquish her freebench (*y*). *A fortiori*, if the husband actually surrender and die before the admittance of the surrenderee she shall be barred; for the subsequent admittance of the surrenderee, though after the death of the husband, shall relate to the time of the surrender, and so precede the title of the wife (*z*).

(*u*) See *Gilb. Ten.* 321.

(*x*) See *Co. Entries*, 123. a. *Hill v. Hill*.

(*y*) 2 *Ves.* 633. 638. *Hinton v. Hinton*. 3 *Ves. Jun.* 256. *Brown v. Raindle*.

(*z*) *Ante*, vol. i. p. 103. 1 *Freem.* 516. ca. 692.

And, by consequence, the widow of the surrenderee shall have her freebench, if he die before admittance. *Ante*, vol. i. p. 104.

So if the husband become bankrupt, and die after the execution of the bargain and sale by the commissioners and before the admittance of the vendee, the widow of the bankrupt shall not be entitled to her freebench (a).

And as it is so repeatedly said that the husband must die seized, at least by relation, in order to enable the widow to claim, it may be proper here to observe, that there can be no disseisin of a copyhold (b); and, consequently, though a person should enter with strong hand into the copyhold premises, yet the copyholder would continue tenant to the lord; and, by consequence, if the husband was *before such entry* seized of the premises, he must, *notwithstanding such entry*, continue seized; and, consequently, such entry cannot defeat the title of the wife.

If a man, in consideration of marriage and to make some provision for his wife,

(a) *Ante*, vol. i. p. 105.

(b) See *Ante*, vol. i. p. 61—2.

by deed executed before the marriage fettles upon her, if she survive him, part of his real estate for her jointure, and in full bar and recompence of all dower or thirds which she can be entitled to; or in any way claim out of any lands, tenements, messuages, or hereditaments, of which, at the time, he was, or ever after, during the coverture, shall be seised of freehold and inheritance, and afterwards purchase copyhold estates of which his widow would be entitled to her freebench by custom, she shall be barred; and a court of equity will not permit her to claim her freebench of the copyholds any more than her dower of the freeholds of her husband (c).

But a jointure of copyhold lands is not within the statute of 27 Hen. 8. cap. 10. sect. 6. (d). Yet it should seem that, under certain circumstances at least, it may be a good bar in equity.

(c) 1 Ves. 54. *Walker v. Walker.*

(d) *Walker v. Walker*, ubi sup. Gilb. Ten. 182—3.

And where a testator, reciting that he was seized of a copyhold, (though he was not so) devised to his wife “in full satisfaction of all dower and right of dower or thirds which she might have or claim in, or out of, his real estate,” and, after making his will, purchased a copyhold, it was held in equity that the devise extended to the freebench of his widow; and that she was, consequently, barred, or at least put to her election: freebench being “a customary right, *nomine dotis*, and so declared by *Bracton*, and instead of dower (e).”

It seems to be now settled, so far as “a No freebench
cautious adherence to some hasty precedents (f)” can be conceived to have settled it, that a widow shall *not* have her dower or freebench of a trust (g). Yet there are other precedents, which do not

(e) *Ambler*, 299. *Warde v. Warde*.

(f) 2 *Bl. Comm.* 337. ch. 20.

(g) 2 *Bl. Comm. ubi sup.* 3 *P. Wms.* 229. *Chaplin v. Chaplin*. 2 *Atk.* 525. *Godwin v. Winsmore*. 1 *Bro. Ch. Cas.* 325. *Dixon v. Saville et al.* 2 *Ibid.* 630. *Curtis v. Curtis*.

appear to have been very hasty ones, in support of the doctrine, that the widow *shall have* her equitable dower of a trust (*h*). And it is acknowledged on all sides that a husband shall have his curtesy of a trust estate (*i*): yet we are, with much gravity, assured, that dower is favoured in equity! And it is amusing to see the embarrassment which inconsistency occasions. In *Chaplin v. Chaplin* we find the Chancellor noticing that, by the preamble to the Statute of Uses (*k*), it appeared that, before that statute, the widow should not have dower of an use; and, therefore, as a trust is now what an use then was, she ought not to have dower of a trust. But it should not be forgotten that it appears also, from the preamble to that very Statute of Uses, that the husband should not, before that statute, have had his curtesy

(*h*) See *Preced. Chanc.* 241. *Lord Dudley and Ward v. Lady Dowager Dudley.* 2 *P. Wm.* 700. *Banks v. Sutton.* 2 *Vern.* 583. *Otway v. Hudson.* And see 2 *Bro. C. C.* 630. in *Curtis v. Curtis.*

(*i*) See the books cited in (*g*).

(*k*) 27 *Hen.* 8. cap. 10.

of an use: though we do not find the Chancellor, in *Chaplin* and *Chaplin*, noticing this latter circumstance. Now if the reasoning of his Lordship was right as to precluding the widow from her dower, it should seem, to moderate capacities at least, that it would equally hold as to curtesy. And, indeed, though his Lordship did not notice the preamble of the statute as to curtesy, but only as to dower, yet he honestly confessed that “he could see no reason for the diversity,” nor should he have made it “himself.” In short, it seems to be acknowledged, that the preclusion of the widow from dower of a trust does not depend upon the reason of the thing, nor upon “any well-grounded principle;” and, therefore, the reader may possibly conclude that it is high time to shut his book; or, at least, with a certain degree of modesty and prudence, to say with Lord Loughborough (*l*) “I confess I think it so much settled, that it would be wrong to discuss it much!”

(*l*) *1 Bro. Ch. Cas.* 328. *Dixon v. Saville.*

But, in the name of wonder, if the matter be wrong, why not set it right? If dower be a *moral* claim, and the *favourite of equity*, why should *equity* suffer “*some hasty precedents*” to come in its way? If an error has been made, can it be any reason why we should continue blundering to our lives’ end? If the point be only questionable, let us meet it manfully, rather than warily shrink from a discussion. If the matter be grown too inveterate for the courts to interfere, yet, surely, if it be merely for the honour of the laws, and to preserve the appearance of consistency in our decisions, (to say nothing of the *morality* of the thing) some other aid should be had recourse to. Our ancestors were neither ashamed nor afraid to bring in occasional bills “for the amendment of the law.”

But free-
bench shall
be subject to
a trust.

However, though it be thus *settled* that a widow shall not have her freebench of a trust, it is settled also (*m*) that if she do

(*m*) See 2 *Ves.* 633—4. *Hinton v. Hinton.* 2 *Freem.* 71. *Bevant v. Pope;* & see *Ibid.* 43. *Noel v. Jevon.*

take

take her freebench at law, she shall take it subject to a trust in equity. Thus another person shall not be a trustee for the widow, though the widow shall be a trustee for another person. So much for congruity; and so much for equity *favouring dower!*

But the instances in which the widow of a trustee shall be permitted to take her freebench at law, and in which she shall not be permitted to take her dower, do not appear to be properly distinguished. If an estate of *freehold* be granted to *A* and his heirs in trust for *B*, and *A* die, his widow shall *not* be suffered to have her dower; because it would be wholly needless, as the estate would descend to the heir who is to perform the trust: and if the widow were permitted to claim, she would only incur an expence and assume a burthen without an emolument. But if a *copyhold* be granted to *A* for life, in trust for *B*, and the custom of the manor be that the widow of the tenant for life shall have her freebench, and *A* die, living *B*, *A*'s widow *shall have* her freebench; for if she do not take it, the estate would be at an

end, as no one else could take it: and if there were no one to take it, the lord would be entitled by escheat; and so not be subject to the trust (*n*). But the widow shall be subject to the trust; as the trust shall be commensurate with the legal estate (*o*): and the legal estate would not be at an end till the determination of the freebench of the widow of *A* (*p*).

A curious point would arise on this case, supposing *B* to have left a widow also; for who then should be benefited by the trust? A widow we have seen (*q*) shall not have her freebench of a trust; one widow, therefore, shall not be a trustee for the other: and, consequently, it should seem that the

(*n*) See 1 *Just. Blackst. Rep.* 167. *Burges v. Wheate*; & ante. vol. i. p. 216.

(*o*) *Ibid.* 162.

(*p*) See 1 *Lev.* 20. *Chantrell v. Randall*, & 1 *Ibid.* 172. *Newton v. Shafto*. & 1 *Keb.* 925. S.C. 2 *Siderf.* 165. *Clarke v. Candle*.

(*q*) *Ante*, p. 79.

widow of *A* shall hold for the benefit of the representatives of *B* (*r*).

But the widow shall have her freebench ^{Freebench} against the lord by escheat (*s*); for the <sup>against the
lord by es-
cheat.</sup> freebench is a continuance of the husband's estate; and, till the freebench expire, the lord's title cannot commence; for, till that event, he will have a tenant (*t*).

So if the lord grant the freehold of the copyhold premises to a stranger, and the husband die without heir, his widow shall have her freebench against the grantee (*u*).

(*r*) See *ante.* vol. i. p. 216, & 227. *Goodright d. Langfield v. Hodges.*

But the widow of *B* may, in such case, come in, by possibility, under the Statute of Distribution.

(*s*) So of dower at common law. *Bro. Dower*, 64. *Extinguishment*, 31. *Ten.* 33. *Watk. on Desc.* 83. N. (*n*).

(*t*) See 1 *Lev.* 20. *Chantrell v. Randall*; & 1 *Ibid.* 172. *Newton v. Shafto.* 1 *Keb.* 925. S. C. 2 *Siderf.* 165. *Clarke v. Candle.*

(*u*) *Hob.* 181. *Howard v. Bartlet.* *Hutt.* 18. *Jurden v. Stone.* *Cro. Jac.* 573. *Waldo v. Bartlet.*

And even if the husband purchase the freehold, and have it conveyed *to another* in *trust* for him during his life, with remainder to himself in fee, the widow shall have her freebench (*x*) : for there will be no enfranchisement or extinguishment (*y*) till the actual decease of the husband; on which event the title of the widow will be complete. But if an absolute enfranchisement or extinguishment take place in the lifetime of the husband, the widow can, of course, have no claim ; as on such enfranchisement or extinguishment the premises must cease to be copyhold (*z*).

It has been already observed that a widow can only claim her freebench by virtue of a *special* custom, and that, consequently, it must belong to such custom to

(*x*) *Howard v. Bartlet*, & *Waldo v. Bartlet*, *ubi sup.*

(*y*) See *Cro. Jac.* 126. *Lashmer v. Avery*, & *ante*, vol. i. p. 357. 364.

(*z*) *Lashmer v. Avery*, *ubi sup.* & *Sir Wm. Jones*, 462. *Dugworth v. Radford*; & see *2 Siderf.* 19, as to the Extinction of Custom on Escheat; & *ante*. vol. i. p. 368.

prescribe

prescribe both the quantity and duration of her estate.

Thus, in some manors, the widow shall have the whole lands (*a*) of which her husband died seized; and, in others, only a portion of them; as the moiety (*b*), or a third (*c*), or a fourth (*d*) part. In some, she shall have a portion of the *rent* (*e*), and not of the lands themselves.

Again, with respect to the duration of her estate, she shall, by the custom of some manors, have the lands of her husband in fee: thus, by the custom of the manor of *Taunton* and *Taunton-Deane*, in the county of *Somerset*, “If any tenant die seized of any customary lands or tenements of inheritance within the said manor, and hav-

(*a*) *Litt.* f. 37. *Kich.* 102. a. 103. a. & b. 105.

(*b*) *Ibid.* *Kish.* 105. a. *Robins. Gov.* b. 2. c. 2.
p. 184.

(*c*) See 2 *Show.* 184. *Chapman v. Sharpe.*

(*d*) *Co. Litt.* 33. b. *Kich.* 105. a. *Mich. 21. Ed. 4.*
pl. 22. fol. 54. a.

(*e*) *Kich.* 102. b. *Customs of West-Sheen, &c.*
art. iv. 2 *Coll. Jurid.* 382.

ing a wife at the time of his death, then his wife ought and hath used time out of mind to inherit the same lands as next heir to her husband, and be admitted tenant thereto; to hold the same to her and her heirs for ever, according to the custom of the said manor, and in as ample a manner as any customary tenant there holds his lands; under the fines, rents, herriots, customs, duties, suits and services for the same due and accustomed (f):" though this may possibly be supposed to differ from *freebench* in the nature of dower, or *in nomine dotis* according to *Bracton*.

(f) This custom of the manor of *Taunton-Dean* is noticed in *Noy.* 2. 1 *Lev.* 172. 1 *Siderf.* 267. 1 *Keb.* 925. though inaccurately; as the custom does not give the estate to the husband on the death of the wife. The custom as to the widow's estate is still observed in the manor.

A custom equally extraordinary prevailed in the manor of *Cheltenham*, in *Gloucestershire*, which gave the lands of the husband to the widow for life, and twelve years afterwards, if she disposed of them; and in case she married a second husband, to him in tail; and in default of issue, to the issue of the first husband; and in default of issue of such first husband, to the heirs (*sub modo*) of the second. But this custom was altered by the private act of the first of Charles the First, *Cap.* 1.

In

In many manors she shall have her freebench for life (*g*) ; in others only during widowhood (*h*) ; and in some under the additional restriction of chastity (*i*).

The estate in freebench is regarded as Freebench is
an excrescence growing out of that of the a continua-
tion of the
husband's
estate.
husband, and being, as it were, a continuance of his estate (*k*).

And where the widow takes *the whole* When the
widow may
enter before
admittance.
of the lands as her freebench, she may enter immediately into them, before any admittance ; as the law casts the possession

(*g*) *1 Lev. 20. Chantrell v. Randall, &c.*

(*b*) *Fitzb. Prescript. 59. Kich. 105. a. & b.*

(*i*) See *Robins. Gavelk. b. 2. c. 2.*

So in the manors of *East* and *West Enborne*, in *Berkshire*; where there is a ludicrous mode of atonement prescribed ; on complying with which the widow shall be re-instated in her lands. And the same custom is said to prevail in *Tor* in *Devonshire*, &c. &c. See *Comp. Copyb. tit. Enborne*, &c. *Cowell & Jacob, tit. Freebench.*

(*k*) See *ante. vol. i. p. 299—300. & the books there cited ; to which add 2 Siderf. 105. Clarke v. Candle. 1 Ves. 54. Walker v. Walker. & ante. p. 84.*

on her, as it does on the heir in cases of descent (*l*).

When not.

But when the widow takes *a portion* only of the lands, it should seem that the possession is not cast upon her any more than at common law; and, consequently, that she will not be warranted in entering **Assignment.** without assignment. And as she shall hold that portion of the lord, and not of the heir as at common law (*m*), it should seem also that the regular mode for her to obtain assignment is by plaint in the lord's court (*n*).

Plaint.

(*l*) See *ante.* vol. i. p. 247. & the books there cited; to which add *Hob.* 181. *Howard v. Bartlet.* *Hutt.* 18. *Jurden v. Stone.* 5 *Burr.* 2787. *Vaughan d. Atkins v. Atkins.*

(*m*) See *post.* ch. vi. (Of Heriots).

(*n*) See *Watk. on Desc.* 81. & Note XXV. to *Gilb. Ten.* 373. 2 *Show.* 184. *Chapman v. Sharpe.* *Kich.* 103. b. & 4 *Co.* 30. b. *Shaw v. Thompson.*

And, therefore, it is said to have been adjudged a good custom, That if the widow should not claim her freebench within a year and a day, she should not have it. 3 *Leon.* 227. *Ca.* 303.

So of gavelkind lands, of which the widow shall have a moiety, she must demand her dower of the heir; and shall have it assigned by metes and bounds. See *Robins. Gavelk.* b. 2. c. 2. p. 175, &c.

And

And if the widow bring such plaint and Damages. have judgment, she shall also recover damages according to the statute of *Merton*. For it has been determined that copyholds are within that statute in this respect; and that the manor-court may award damages under that act as far as the demandant is damned, whatever the amount may be (*o*).

Of admission to the estate taken in free-
Admission,
bench, and the consequent fine, I have &c.
spoken at large in the preceding vo-
lume (*p*).

(*o*) *Cro. Eliz.* 426. *Shaw & Thompson.* 4 Co. 30. b.
S. C. *Moore*, 410. S. C. *Gilb. Ten.* 183—4.

(*p*) p. 272. & 299.

OF CURTESY.

Of the husband's estate or customary courtesy little remains to be said. Like the estate of the widow, or that of freebench, it is claimable only by *special custom* (*q*); and, consequently, it must equally belong to such custom to regulate it, both as to its quantity and duration or extent.

Thus, by the custom of some manors, he shall have the whole (*r*) of the lands of which the wife died seized of an estate of inheritance. In others, he shall only have a moiety (*s*), or other portion.

(*q*) 4 *Cs.* 22. a. & b.

(*r*) 1 *Andrf.* 192. *Ewer v. Astwick.*

(*s*) See *Robin. Gavelk.* b. 2. ch. 1.

In cases where he is to take the *whole*, he may enter, &c. before any admittance (*t*); but in those in which he is to take a *portion* only, it seems evident that an assignment is as requisite as in those cases in which the widow takes a portion as her freebench (*u*).

Again, in some manors, the husband shall have the lands of his wife for life (*x*): and, in others, only while he remains unmarried (*y*).

Curtesy by the custom differs from that by the common law also in this; that, if the custom does not expressly require the having issue, the having issue is not essential to give him title to the estate (*z*).

But, in order to entitle the husband to his courtesy, it should seem to be equally

(*t*) *Ante.* vol. i. p. 247.

(*u*) See *ante.* p. 90.

(*x*) 1 *Andrs.* 192. *Ewer v. Astwicke. Moore,* 271.
Ewer v. Aston. (S. C.)

(*y*) See *Robins. Gavelk.* b. 2. ch. 1. p. 136.

(*z*) *Ante.* vol. i. p. 273—4. & *Robins. Gavelk.*
b. 1. ch. 1. p. 136. 150.

necessary that the wife should die seized as it is that the husband should die seized in order to entitle the widow to her free-bench. But, as the wife is *sub potestate viri*, his title cannot, of consequence, be defeated or prevented by her alienation, as the widow may be prevented from claiming by the alienation of the husband in his life-time (a).

In Sir *John Savage*'s case (b) it was adjudged that, where the custom is that if a person takes to wife any customary tenant of such manor, and have issue, and survive his wife, he shall be tenant by the curtesy, that he shall not be tenant by the curtesy if the wife was not a customary tenant of the manor *at the time of marriage*, though a customary estate held of the manor descend to her during coverture. But this case of Sir *John Savage* was, in that of *Clements v. Scudamore* (c), denied to be law:

(a) See *ante.* p. 74.

(b) 2 *Leon.* 109.

(c) 1 *P. Wms.* 62. 2 *Lord Raym.* 1028. 1 *Salk.*

and it would not have been here noticed had it not been cited as law in some publications of more recent date.

It has been already remarked (*d*), that a husband shall have his courtesy of a *trust*, though a widow shall, under the same circumstance, be precluded from claiming her freebench.

With respect to the doctrine of *relation*, and the consequences of extinguishment and enfranchisement, the observations before made as to freebench will be equally applicable to courtesy. And, in the preceding volume (*e*), I have spoken as to admission and fine.

(*d*) *Ante.* p. 80.

(*e*) Vol. i. p. 272—299—300.

CHAP. IV.

GUARDIANSHIP.

*Proclamation for the
heir to claim.*

*Seizure on
non-claim.*

IT has already been noticed (*a*) that, when copyholds became inheritable, the lord, on the death of his tenant, made proclamation for the heir to claim the premises of which such tenant died seized; and in case the heir did not claim on the third proclamation being made in court, the lord might resume the possession of the lands till such claim was duly substantiated, and that within a definite period, which, according to the old law, was a year and a day.

(*a*) Vol. I. p. 230. &c.

Till

'Till the year and day had actually *Quousque*. elapsed, the heir could demand the lands, and the lord was obliged, on such claim, to restore the possession: and, 'till that time, therefore, the lord's possession was only a possession *quousque*:—and it is to this hour said (*b*), that the lord can only seize *quousque*, by reason of non-claim, without a special custom; though the period affixed for such claim has been wholly neglected and disowned!

As courts are seldom now held more frequently than once in a year, and the heir is not obliged to claim till the third proclamation, the year and day, reckoning from the ancestor's decease, are generally elapsed before the lord is warranted in seizing at all. What then is to be now understood by his seizing *quousque*? Is the heir to be absolutely unlimited in point of time, and, by consequence, the lord precluded from granting out the lands to any other person, and so to be robbed of

(*b*) *Vide Ante.* vol. i. p. 234.

GUARDIANSHIP.

his rights (*c*)? Or are the year and day to be computed from the last (or third) proclamation? But, if so, by what law is the time postponed?

*Infant heir
not bound by
non-claim.* If, however, the heir was an infant, he was not bound, though the year and day had actually elapsed; he was not

*Age of major-
ity.* foreclosed till he attained his majority

(*d*), which was fixed by the ancient law (where a special custom did not interfere) at fourteen (*e*); though as the age of twenty-one became afterwards the age of majority as to the tenant by knight-service (*f*), and as the tenure by knight-service was the chief and most honourable tenure, the same age was, as to many

(*c*) He may indeed grant *subject to the claim of the heir of the former tenant*. But who would accept a grant which would be for ever open to his claim?—What must be done as to fines, &c.? Must the grantee and his heirs pay absolute fines, &c. for a contingent or conditional estate?

(*d*) *Ante.* vol. i. p. 234.

(*e*) *Watk. N.* cXLIV. to *Gilb. Ten.* 463.

(*f*) *Ibid. & N. I.* p. 339.

purposes,

purposes, at length affixed as that of majority as to persons who had nothing to do with the bearing of arms; to tenants in soccage; to bond-men; and even to females (*g*).

Hence the infant copyholder was to be out of ward at fourteen, and yet he was not to be accountable for his acts till one-and twenty! So rapidly do absurdities accumulate when principles are forsaken!

If the deceased tenant had held in chivalry, or by military service, the lord was entitled, without account, to the profits of the lands during the minority of the heir; as the heir was, during that period, incapable of rendering the returns. The lord, therefore, having no services performed, was authorised in resuming the lands, as the consideration of his gift had failed (*h*). Guardian in chivalry.

(*g*) And see the *Mirrour*, ch. v. f. 2.

(*h*) See *Watk. on the King's Claim as Guardian of the Duchy of Cornwall.* p. 8.

Guardian in
foggage.

With respect, however, to foggage tenure, the infant could perform his services by another (*i*) ; and if the services were performed, the considerations of the gift were fulfilled, and the lord was satisfied. But as the lands in foggage did not move from the guardian or next friend, as those in chivalry did from the lord, the former was accountable for the profits (*k*). And by the custom of *Kent*, the lord himself was answerable to the infant for the profits, in case the guardian proved insolvent, or did not render his account (*l*).

Of copy-
holders by
custom.

The copyholder was considered as more dependant upon his lord ; he was still deemed, in some respects, as his tenant at will ; and the lands moved immediately from the lord of the manor : and hence a

(*i*) Except as to fealty or suit of court. For the law did not permit one person to swear for another.—See *Post. ch. vii. of Suit.*

(*k*) *Watk. on the King's Claim as Guardian of the Duchy of Cornwall.* p. 9.

(*l*) *Lamb. Peramb. Kent.* 552. Ed. 1596. And see also *Robins. Gavelk.* b. ii. ch. 3. p. 187.

special.

special custom, enabling the lord to retain the profits during the minority of his tenant, or to assign the custody of the lands to another without account, has been held good (*m*).

But unless a *special* custom can be proved ~~Without~~ to the contrary, (and we may here observe, that a special custom must always be proved by him who would avail himself of it) (*n*), the lord is obliged to admit the infant, on due claim, by that person who is the next of kin of such infant to whom the tenements to which he is so admitted cannot descend (*o*).

Hence it is often said that the guardian in socage is entitled also to the wardship of the infant who holds by copy (*p*). But

(*m*) 1 *Leon.* 266. *ca.* 357. 20 *Eliz.* in C. B.

(*n*) *Ante.* ch. 11. p. 57.

(*o*) 2 *Roll. Abr.* 40. *Gardien*, (P.) pl. 1. *Egleton's case. Co. Copyb.* s. 59. *Tr.* 136. See 2 *Lutw.* 1189. 1190. *Church v. Cudmore. Hob.* 215, 16. in *Cocks v. Darson. Hutt.* 16, 17. 2 *Ves.* 303. *Harg. N.* (13.) to *Co. Litt.* 88. b.

(*p*) See *Roll. Harg. &c. ubi supra.*

this position may not always hold, as the copyhold may descend very differently from the lands in soccage at common law; and so, by possibility, the next of kin of the infant to whom *the lands in soccage* cannot descend, may not be his next of kin to whom the *copyhold* cannot descend, and, consequently, may not be the person entitled to the wardship.

Under the
Stat. 9 Geo.
for admis-
tance.

If on due proclamations the infant does not appear, either in person, or by his guardian or attorney, to be admitted, the lord may now, by Statute 9 Geo. cap. 29. appoint, at any subsequent court to be holden for the manor, any fit person to be guardian or attorney for such infant, for the purpose of admittance only; and admit such infant by such person, and impose the same fines as if the infant was of full age.

It is observable that the statute of Geo. I. expressly confines itself to those infant or *femes covert* who take "by descent or surrender to the use of a last will." Suppose a person should surrender

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immediately to the use of an infant or *feme covert*, as to *A.* for life, with remainder to his younger son, and *A* die before (*q*) admission, what is the lord to do? Is such case within the equity of the statute? Or is not a proper distinction made by that act? For, in the cases of descent and last will, the lord can have no tenant *till their admittance*, as the former tenant (the ancestor or testator) is no more; while, in the other case, the lord has a tenant without their admission, as the surrendee continues, till their admission, the actual tenant of the lord.

We have seen that by virtue of a *special custom* in a manor, the lord may be entitled to the profits of the lands of his infant copyholder, or assign the guardianship to whom he pleases; but that if there be *not* such a special custom, the guardianship belongs to the next of kin of the infant, to whom the copyholds can-

(*q*) For if *A.* had been admitted, and died, his admission would have been that of his son also.

not descend: hence a distinction presents itself as to the solution of the question, whether a father can, under the statute of *Charles the Second* (*r*), appoint a guardian by his will as to the copyholds of his child?

If there *be* such a custom, it would certainly be unreasonable to suffer it to be taken away by implication, as a statute ought not to be extended by implication to the prejudice of the rights of any one (*s*); and hence it has been very properly determined (*t*), that the father can *not* dispose of the guardianship of the copyholds of his child, *in prejudice of such custom*; but it has no where been determined, that I know of, that such appointment would not be good *when no such custom existed*. For though such appointment would not be good in the one case,

(*r*) 12 Car. II. cap. 24. s. 8. & 9.

(*s*) See *Watk. N. LXXVIII.* to *Gilb. Ten.* p. 417. & post. ch. x, *Of Statutes.*

(*t*) 2 *Lutw.* 1189. 1190. *Church v. Cudmore.* 3 *Lev.* 395. *S. C.* 1 *Lord Raym.* 132. *S. C.* cited.

it does not follow that it should not be good in the other. But, on the contrary, it should seem that the appointment *would* be valid as to the latter case (*u*). However, as the guardian in socage seems entitled to the custody of *the body*, notwithstanding the custom, it should seem also that the father may, by that statute, appoint a guardian of the *person* of his child, if he cannot affect his copyhold property (*x*).

The duties of the guardian, with respect Duties of the
guardian.
to the copyholds of his ward, are two-fold. In the first place, it is his province to cultivate and manage the lands as may be most advantageous for the infant. And, for this purpose, he may make such a lease as is warranted by the custom, so it exceed not the minority of the ward; and maintain debt for the arrears of rent (*y*).

(*u*) See *Kielw.* 186. *a. pl.* 1. & *Watk. N.* CLXXII.
to *Gilb. Ten.* 476—7. & *Lutw. ubi sup.*

(*x*) *Watk. ubi sup.*

(*y*) See *Dyer.* 303. *a. Marg. Sowper v. Goodbody.*

In the next place he is to render such returns to the lord as a copyholder may render by another (z). He must pay the rents, and perform the rustic or agricultural services; as to plough the lord's land, to reap or gather in his corn, &c. for such services still continue in various manors, though now they are little more than formal; and as the tenant is mostly bound to perform them for a certain number of days in the year, they usually go under the denomination of *boon* or *due-days* (a).

The guardian, however, cannot swear fealty for his ward, as one person cannot swear for another. Nor does it appear that the guardian can do any service in court, for such service must be a personal one. By the common law even a free-suitor could not have made an attorney to do suit, but the law was altered by the *statute of Merton* (b); nor, even after that statute, could the attorney sit in judgment

(z) *Calth.* 51—2.

(a) See *post.* ch. ix.

(b) 20 Hen. III. cap. 10.

for his principal (*c*). Copyholders, however, were not within the *statute of Merton* (*d*), but are still obliged to do suit in person, though another may essoign the copyholder (*e*).

When a woman takes husband, she must be answerable for him; it is her own act. If he commit waste, or refuse the services, it will be a forfeiture of her lands (*f*). But the infant is not answerable for the acts of his guardian, as the guardian is not of his own choice; the infant wanting discretion to choose, and the law assigning the individual. If the guardian, therefore, commit waste, the wardship only, and not the lands, shall be forfeited (*g*). Besides, the interests of the husband and guardian are wholly different; the former is entitled to the profits to his own use, the latter only receives them to those of his ward, and is accountable for

(*c*) *Mir.* cap. 5. sect. 2. & 2 *Inst.* 99—100.

(*d*) 2 *Inst.* 100. & post. ch. vii. Of Suit.

(*e*) 1 *Leon.* 104. Sir John Braunche's case.

(*f*) *Ante.* vol. I. p. 338—9.

(*g*) *Ante.* vol. I. p. 339.

them

them to him. The reasons, therefore, for which the husband sits on the homage do not hold as to the guardian.

**Revocation
of wardship.**

If the guardian does any act which is inconsistent with the trust reposed in him, or if he knowingly neglects to fulfil the duties of his office, he shall forfeit his wardship; for his office was instituted for the benefit of the infant, and not to confer any advantage on himself. Hence we find instances in the rolls of many manors, and especially in the more ancient ones, of the formal revocation of the guardianship which had been assigned by the lord: “Because the aforesaid *A. B.* did not perform the conditions on which the said custody was granted as aforesaid: But, contrary to the trust reposed in him, the said *C. D.* (the infant) and his customary-lands ill-treated; and abused his power in that behalf committed.” “Wherefore the custody or wardship of the said infant, and of his customary tenements, heretofore committed to the said *A. B.* as aforesaid, is accordingly, by the lord of the said manor, revoked, and, to all intents and purposes, utterly and absolutely annulled.”

APPOINT-

APPOINTMENT OF GUARDIAN (*h*).

"AND BECAUSE the said *A. B.* is an infant (to wit) of the age of two years, or thereabouts, the wardship or custody [as well of the person of the said *A. B.*]" (*if the custom be such*) "as] of the copyhold or customary tenements to which he has at this court been admitted, is granted unto *C. D.* his next of kin, to whom the same tenements cannot, according to the custom of the said manor, descend, until the said *A. B.* shall attain his full age, according to the custom of the manor aforesaid (*i*): HE the said *C. D.* PROVIDING,
out

(*b*) Such guardian, if ejected, may have an *ejectione custodiae*, or at least an action in the nature of it. *I Leon.* 328. *Cole v. Walles.* *Cro. Eliz.* 224. S. C.

(*i*) The age of majority differs in most manors. In some it is fourteen, in others fifteen, &c. In modern entries we frequently find the wardship committed till twenty-one. But these latter instances seem to have crept in through error from the circumstance before noticed (the age of the military tenant): For, at the time in which our customs commenced, (and a custom must certainly have had a beginning, though we cannot at this day trace it. See *Davys's Rep.* 32. a.)
the

out of the rents and profits of the said tenements (or so far as the same shall extend), reasonable maintenance and education for the said *A. B.* during such his minority; ANSWERING such services from time to time to the lord as shall be due for the same tenements, according to the custom of this manor, and which a guardian may perform; AND RENDERING a full and just account when thereunto lawfully required."

the period of twenty-one was not applicable to the rustic or villein-tenant. The period of twenty-one was relative to wearing the *heavy armour*, and not to the *discretion* of the person. See *Watk. N. i.* to *Gilb. Ten. 339.* & *N. cxliv. p. 463.* & *ante. p. 98.*

In old rolls we often find the wardship granted "*durante bene placito Domini;*" but more usually, "*Prevenerint ad plenam ætate sua secundum Consuetud. Maner. p. dict.*"

CHAP. V.

OF LICENCE.

A LICENCE is an express authority given What. by the lord for the time being, to the copyholder, to do an act which such copyholder would not be warranted in doing by the common law or the custom of the manor; as to demise the copyhold for years, or to fell timber, or the like.

And as such licence is only an authority, Who may it must necessarily cease with the existence, ^{grant a li-}
 or interest, of the lord who grants it. If a lord who is tenant for years, or for life ^{Lord having} _{a particular} only, of a manor, therefore, grant licence _{interest only.} to his copyholder to lease for years, and die, or his interest in the manor expire, the licence becomes void, and the term of years created in consequence of such licence

licence must cease and be absolutely extinguished (*a*). So if the licence be to fell timber, and the lord's interest determine before the timber be felled, the licence ceases; and the copyholder cannot proceed to cut the timber (*b*). But if the licence expire *after* the lease be made, or the timber be felled, it will be *no forfeiture of the copyhold* (*c*), as the copyholder acted under the express authority of the lord for the time being: And the lord for the time being may dispense for ever; so that none in remainder or reversion can take advantage of the act, even though such lord be only tenant at will (*d*). But it should be observed, that what is here said of the lord for the time being, must be understood of a *rightful* lord; for as a lord *by wrong* cannot dispense as to a lord

Lord by
wrong.

(*a*) 1 *Roll. Abr.* 511. Copyhold (K.) *Pettie & Debans.* 2 *Brownl.* 40. S.C. by the name of *Petty & Evans. Co. Copyh.* s. 34. *Tr.* 72. 1 *Keb.* 25. *Munifas v. Baker. Gilb. Ten.* 203. 298—9.

(*b*) See *Gilb. Ten.* 298—9. & 1 *Keb.* 25—6.

(*c*) See *Gilb. & Keb.* as above.

(*d*) 1 *Lev.* 26. *Milifax & Baker, & ante vol. i.*
p. 349—350.

by

by right (e), so it should seem, from the very nature of the thing, that no licence granted by a wrongful lord can be good.

But, though the rightful lord may *disperse with a forfeiture* as to the lord in remainder, yet he cannot exert any ownership over the *freehold*, save only as to his own interest. He may grant a copyhold in fee, though he be only tenant at will himself; for the grantee would be in by the custom, which is paramount the interest of the lord (f). Yet, when the copyholder does any thing under the immediate authority of the lord, and not by the custom, he must be regulated by the authority which such lord can give. The grantee of a *copyhold* comes in under the custom, and takes only a *copyhold* interest; he meddles not with the *freehold* or *inheritance* of the premises. But a *lease by licence* is a *common law* interest (g): it may endure longer than the interest of

Lord by
right cannot
affect the
freehold, ex-
cept as to his
own interest.

(e) *Milfax v. Baker*, & ante, vol. I. p. 349—350.

(f) *Ante*, vol. I. chap. ii. Of Grants.

(g) See *ante*, vol. I. p. 301. & *Post*. 121.

the copyholder himself; as, in the case of escheat, the lease shall continue against the lord who granted the licence (*h*), though it would not be good as to a lord in remainder (*i*): this, therefore, affects *the freehold and inheritance of the premises*; and the lord for life or years has only *a particular interest in the freehold*. It seems, therefore, reasonable, that the lord who has only a particular interest in the freehold, should not affect, or authorize another to lessen the value of, that freehold, any further than for his own time. And this differs most essentially from a grant of the *copyhold interest*; where the copyholder would be in by the custom; as the custom has nothing to do with the *freehold or inheritance of the lands*, but with the *copyhold interest only*.

If the lord, therefore, having only a particular interest, grants a licence to fell

(*h*) See *Hutt.* 101. *Turner & Hodges.* & *Litt. Rep.* 233. S.C.

(*i*) See *Pettie v. Debbans, & Munifas & Baker, ante.*

timber,

timber, and the copyholder accordingly fell, it would be *no forfeiture of the copyholder's interest*, as he would act with the privity of his lord: but it should seem that the lord in remainder may have his remedy over against the particular or licencing lord, as the lord in remainder had a property in the trees; and perhaps may have an injunction to stay the felling, if the timber not actually cut, though the particular lord could not have such injunction against his own act (*k*).

In the case of *Pettie & Debbans* (*l*), it was adjudged, according to *Rolle*, that a lord, who was only a tenant at will of the manor, could not grant a licence to his copyholder to lease for years. And, indeed, as the rule seems to be that a lord cannot give licence to make a lease for a longer time in the tenancy than the lord himself has in the seigniory or manor (*m*), it must be evident, that a tenant who holds

(*k*) See 3 *Ves. Jun.* 3. *Wentworth v. Turner*.

(*l*) 1 *Roll. Abr.* 511. *Copyh.* (K.) pl. 1.

(*m*) 2 *Brownl.* 40. *Petty v. Evans*.

only at will cannot give licence to create a term of years. Yet it may be at least very doubtful, if such tenant at will (he being the lord *pro tempore*) grant licence to the copyholder to demise for years, and the copyholder demise accordingly, whether such demise would be *a cause of forfeiture of the copyhold*, as the copyholder would act with the privity of his lord; though the *demise might be immediately avoided* by the lord in reversion, on his determining the interest of his tenant at will. A lord who holds at will may dispense even as to those in remainder or reversion: and it should seem that the very act of licencing would preclude the lord who licenced from availing himself of any forfeiture, by reason of an act done in pursuance of such licence, and be a sufficient justification of the copyholder who acted under it; and the dispensation of the forfeiture for a moment would seem a dispensation for ever; the act once ceasing to be the cause of forfeiture, would surely never be permitted to be the cause of forfeiture at any future time, as forfeitures are not to be favoured.

Accord-

According to Sir *Edward Coke* (*n*), the steward cannot, *virtute officii*, grant licence to demise, though in full court and in the name of the lord, unless there be express words in his patent to enable him to do so, or by special authority given him by the lord, or by some particular custom; and this doctrine of Sir *Edward Coke* is adopted by the late *Chief Baron Gilbert* (*o*).

The copyholder must pursue the terms of his licence, as the licence is in the nature of an authority. If he have a licence to lease from *Michaelmas* last, and he lease from *Christmas* next, the lease

(*n*) *Copyb.* f. 44. *Tr.* 101—2.

(*o*) *Ten.* 333. But see *Kich.* 85. a. *contra*.

And, even granting the law to be with lord *Coke*, it should seem that any act of the lord, or even his acquiescence, after the granting of such licence by the steward (the lord being apprized of such licence), would amount to a confirmation of it. As if the lord sign the court-book, in which an entry of the licence is made, or if he receive the fees on licence, &c. And besides, the copyholder, on applying for licence in full court, is surely not obliged to *crave over* of the steward's appointment.

will not be warranted (*p*). So, if a copyholder *in fee* have a licence to demise for years, *if he so long live*, and he demise for years *absolutely*, the lease would not be good: But if he were tenant *for life only*, it would be otherwise, *as the condition would be implied* (*q*).

If the copyholder have a licence to lease for twenty-one years to commence from Michaelmas, and he make a lease for twenty-one years to commence at that day; and afterwards, but before Michaelmas, he make another lease for the same term, to commence also at the feast of St. Michael; the licence would be satisfied by the first lease, and the second would not be warranted (*r*),

But, if the licence is to lease for five years, and the copyholder lease for three,

(*p*) *Cro. Eliz.* 395. *Jackson v. Neale.*

(*q*) *Cro. Eliz.* 461. *Haddon v. Arrowsmith.* *Cro. Jac.* 436. *Worledge v. Benbury.*

(*r*) *Moore*, 148. *Ca.* 329.

it would be good (*s*); as he may demise for a less, though not for a greater, term than his licence specifies.

The lord may grant a licence on a condition *precedent*, as it will not properly operate as a licence till the condition be performed; but he cannot grant a licence on a condition *subsequent*, as he gives nothing, but only dispenses with the forfeiture; and the estate passes from the copyholder and not from the lord; and the lord cannot annex a condition to the estate of another person (*t*).

But the lord cannot enable his copyholder, who, in law, holds only at will, to demise for *life*, though a custom be alleged to support it (*u*).

(*s*) *Cro. Jac.* 436. *Worledge v. Benbury.*

(*t*) *Popham*, 105—6. *Hall v. Arrowsmith. Cro. Eliz.* 461—2. S.C. by the name of *Haddon v. Arrowsmith.*

(*u*) *Godb. 171. Ca. 236.* And an estate for *life*, by licence, would be a *freehold* interest.

Licence to a
tenant in tail.

Nor if the lord grant a licence to a tenant in tail to demise for twenty years, and the tenant in tail demise accordingly, shall such demise *bind the issue in tail*. For a licence is only a dispensation *as to the lord*, and passes no estate. It only enables the copyholder to demise, and he can only demise what he has in himself (*x*). The lord cannot by his licence affect the interest of *the issue in tail*.

Agreement
for licence.

If the lord enter into an agreement with his copyholder to grant a licence, and receive a consideration, a court of equity will compel him to grant it accordingly (*y*).

Custom in
case the lord
refuse
licence.

A custom that on payment of ten years rent the lord should licence for ninety-nine years, and, if he refused, the tenant might do it without licence, was adjudged good (*z*).

(*x*) See *Kich.* 84. b. 85. a.

(*y*) *Nels. Chanc. Rep.* 49. *Hungerford v. Austen*.

(*z*) *Grove & Bridges*, cited as adjudged in 2. *Keb.* 344. *Porphyry v. Legingham*. And see *Gib. Ten.* 294, & *Watk. N.* cxlv.

The term created by licence is a common law, and not a copyhold, interest. It may be assigned by the lessee without any further licence or consent of the lord. It is extendible at law; and may even continue after the determination of the copyhold (a). Term under a licence is a common-law interest.

FORMS OF LICENCE.

Licence to demise.

“Also at this court, licence was granted (In Court.) to A. B. one of the customary tenants of this manor, to demise and let ALL that, &c. unto C. D. [or ‘unto any person or persons at his pleasure,’] for any term not exceeding eleven years, to commence from the day of next. And the said A. B. paid unto the lord for such his licence a fine of three shillings and eight pence, being four-pence for each year of the said term.”

(a) See *ante*, vol. I. p. 301. 3 *Leon.* 69—70.
Ca. 106. Hob. 177. *Swinnerton v. Miller.*

If

If out of Court, say,

“ Manor of } “ Be it remembered that, on
 “ Fairhurst. } the day of in the
 year, &c. licence was granted by me,
E. F. lord of the said manor, unto *A. B.*
 one of the customary tenants of the same
 manor, to demise and let ALL, &c. unto
C. D. &c. for the term of seven years, to
 commence on the feast-day of St. Michael
 the Archangel next ensuing. And the
 said *A. B.* gave for such his licence a fine
 of—”

E. F.”

In the lease, made in consequence of
 the licence, it would be proper to insert
 covenants to the following effect:

Covenants in
 a lease under
 licence.

“ That (*the lessee*) his executors, administrators, or assigns, shall not, nor will, do, or cause, or knowingly suffer, to be done, any act, matter, or thing whatsoever, by means of which the estate and interest of the said *A. B.* his heirs, or sequels, of, in, or to, the said messuage, &c. or any part or parcel thereof, may in any wise be forfeited or impaired.”

“ That

“ That (*the lessor*) his heirs, executors, or administrators, or some or one of them, shall and will, from time to time, and at all times hereafter, discharge, or, upon reasonable request, save harmless and indemnify, the said *C. D.* his executors, administrators, and assigns, of, from, and against, all rents, dues, duties, and services, from henceforth, during the said term, to be paid, rendered, or performed, to the lord or lords of the said manor for the time being, for, out, or by reason of the said demised premises, or any part or parcel thereof.”

Licence to fell Timber.

“ Also at this court licence was granted to *A. B.* one of the customary tenants of this manor, to fell, within six calendar months from the fitting of this court, twenty oak trees now growing on a certain tenement called *C.* within the manor aforesaid, and already set out and marked by the woodward or reeve of this manor [or ‘ to be forthwith set out and marked by the woodward or reeve of this manor,’]

as

as in such cases used and accustomed, for the purpose of repairing the buildings and fences of, or belonging to, the said tenement. But he paid no fine for his licence, by reason that the said trees were assigned for botes."

" —— to fell, within six calendar months from, &c. two hundred oaks, eighty elms, forty-eight ash trees, and twenty-two beech trees, now growing on certain tenements called *D. E. F.* and *G.* within the manor aforesaid, to be chosen by the said *A. B.* [or ' forthwith to be set out and marked by the woodward or reeve of this manor, as in such cases used and accustomed,'] and the same to convert to his own use, or to fell and dispose of at his pleasure, without any account to be rendered for the same. PROVIDED nevertheless that this licence shall not extend to the felling any of the oak trees now growing in or near the crofts known by the names of the Well-croft and Lamb-croft, and called the Boundary-oaks; nor to a certain oak called Arthur's-oak; nor to any trees growing in the walk or avenue called the Prior's-walk.

And

And the said *A. B.* paid to the lord for a fine for such his licence one hundred pounds [or, ‘ And, for such his licence, the said *A. B.* is to pay to the lord for a fine, within three calendar months after the felling of the said trees, the sum of three shillings and four-pence for every ton of timber which the said trees shall contain, according as the same shall be admeasured by the woodward or reeve of this manor, as in such cases used and accustomed.’]

CHAP. VI.

OF HERIOTS.

Nature and
history of
heriots.

THAT system which we usually denominate the feudal, while it anxiously provided for the liberty of the individual, was admirably calculated for national defence. Each freeman was a soldier (*a*), and was obliged to render to his country his services in war. He was to be provided with arms, according to the usage of the times and the rank which he bore, not only for personal, but for national, safety.

Military
heriot.

In these arms the society was interested (*b*); and, when the tenant died, they

(*a*) *Vide LL. Gul. cap. 65. ap. Seld. ad Eadmer.*
And see *Watk. Introd. to Gilb. Ten. & Note 1. p. 339.*

(*b*) See *Gilb. on Distresses*, 9.

devolved to his superior, to his immediate lord, that they might continue to be used in the defence of the state; and hence the origin of the *heriot*.

We find the heriot either expressly noticed or alluded to in most of the Gothic codes (*c*) ; and from the northern nations have we also derived the term (*d*).

As the feudal system declined, the *heriot* was frequently commuted; and the lord received a sum of money instead of a portion of arms, horses, or habiliments of

(c) *LL. Longob. lib. III. Tit. 8. f. 4.* *Lindenbrog.*
Cod. Leg. Antiq. 679. *LL. Canut. cap. 69.* & 75.
apud Lamb. & *Wilk.* Compare *LL. Can. c. 69.* &
LL. Gul. c. 22, 23, 24, & 29. (*apud Wilk. LL.*
Sax. Seld. ad Eadmer. & *Kelb. Norm. Dict.*) & *LL.*
Hen. I. cap. 14. (*ap. Wilk. & Lamb.*) & *Doomsday*
Book: Berchescire, tit. Walingeford, & *Herescire,*
tit. Hereford Civitate, & *Arcenefelde.*

By the 75th law of *Canute*, the heriot was not to be accounted for when the tenant died in battle.

(d) From *heue* (*Exercitum*) & *geat* (*fusus*). *Bellicus apparatus*; provision for war. *Vide Spelm. Gloss.*
voc. Heretum. *Somner's Sax. Dict.* v. *heue-geat.*
Gloss. *dd Wilk. LL. Sax. v. heue-geat.* *Fortesq.*
Mon. Pref. lvii—lvix.

war.

war. Such was the usage of *Normandy* before the conquest of England (*e*): and although *William* ordained the rendering of arms (*f*), yet we find the payment in money usual in the time of *Henry the Second* (*g*), and required in that of *John* (*h*).

Confounded with the Relief. The heriot was often confounded with the relief, though, in fact, they differed essentially. The heriot was paid on the determination of the tenancy—the relief on the accession of the heir (*i*).
See my note on Co. Litt. 83. a.

Villein-
heriot.

From analogy to the proper, or military, heriot, was the heriot of the villein or husbandman demanded. In the case, indeed, of an absolute or pure villein, as

(*e*) *Graund Cουflumier de Norm.* cap. 34. *de Relief.* f. 56. b.

(*f*) *LL. Gul.* cap. 22, 23, 24.

(*g*) *Vide Glanv. Lib. 9. cap. 4. fol. 143—4. Ed. 1780.* & see *Lord Lyttleton's Hist. Hen. II. b. ii. N. to p. 100. vol. 3. p. 325—330, 8vo. ed.*

(*h*) *Mag. Cart. Reg. Johannis, cap. 2. ap. Blackst.* in which the relief spoken of is called the *ancient relief*: “*per antiquum relevium.*”

(*i*) *Vide Spelm. Gloss. v. Hereotum. Co. Copyh. f. 25. Tr. 33—4. Fitzh. Hariott. pl. 6.*

his

his lord was, in strictness, the owner or proprietor of his chattels, the heriot, when taken, was, in truth, an indulgence, as it amounted to a relinquishment by the lord of the rest of the property (*l*).

As the military tenant was to render his warlike accoutrements, so the husbandman or socage tenant was to render his best beast (*m*). The former were necessary for the continuance of the national defence, and the latter was to be used for the purposes of agriculture. The villein-heriot, however, differed in different manors (*n*), as it depended upon reservation, or some agreement which afterwards ripened into custom.

(*l*) See 2 *Bl. Comm.* ch. 6. p. 97.

(*m*) “*Si Lib. Ho. ibi moritar. Rex ht. Caballu. ej. cu. Armis. De Villo. cu. morit. ht. Rex i. Bove.*” Doomsday Book. *Herefscire. tit. Arcenefelde.*

LL. Gul. cap. 29. De relief a Vilain. Le meilleur Aveir quil avera u Chival, u Buf, u Vache, donrad a son seignor de relief.

(*n*) Sometimes it was the best *dead* good, without any relation to agriculture. See *post. p. 138. 142.*

Whether ori-
ginally gra-
tuitous.

We are told by *Bracton* (o), *Fleta* (p), and *Britton* (q), (who by the way scarcely differ in their description) that the heriot was originally a voluntary or gratuitous bequest of the tenant. But I apprehend that this must be understood merely of the heriot of the husbandman (r), and not of the military heriot; since we find the latter fixed as a right, as a legal duty, at least so early as the time of *Canute the Great*, confirmed in that of *the Conqueror*, and acknowledged in the charters of *Henry the First*, *John*, and *Henry the Third*. In some Saxon wills, indeed, we find express bequests of an heriot to the lord (s): But such instances seem only from abundant caution, that the testators might not appear unmindful of their lord, and to prevent the chattels of the deceased from

(o) *Bract. lib. 2. cap. 36, s. 9, fol. 86. a.*

(p) *Fleta. lib. 3. cap. 18, fol. 212.*

(q) *Britt. cap. 69, fol. 178. a. (493.)*

(r) And see 2 *Black. Comm. 423.*

(s) “ — eneſt mine Lhouende hiſ nigre Heriſt.”
Will of Wolgith, A.D. 1046. Somn. Gav. App. 211
And see *Lamb. Peramb. Kent, 493. Will of Byrtrice & Elfswyðe.*

passing into other hands, and especially into those of the church; since it is evident, from the very bequests referred to, that, though the heriot was expressly directed to be paid, it was considered as the lord's "*right*."

Having thus cursorily traced the origin and history of heriots, I shall proceed to the law relative to them, as it appears to be acknowledged at this day.

Heriots, then, are divided into heriot-^{Division of} heriots.
custom, and heriot-service.

Heriot-custom is that which is due by virtue of an immemorial usage of a certain *place* or *district*, *precinct* or *territory*; as within the *manor of Fairhurst*. The custom by which it is due is, like all other customs, *local* (*t*), *i. e.* is relative to the place *within which* the heriot is claimed, and not merely relative to these or those particular lands *for which* it is payable.

(t) *C. Litt.* 33. b. & 113. b. & *ante.* ch. 11. Of
Customs, p. 55.

Thus, an heriot due on the death or alienation of *every* tenant of the manor, is an heriot-custom (*u*). It is not due on the death of *A.B.* merely because he died seized of Black-acre rather than of White-acre, or of White-acre rather than of Green-acre, but because he was *a tenant of the manor generally*. It is not due by reason of the particular or specific grant of Black-acre; it is not due by reason of a particular or express reservation; but only and immediately by reason of the usage immemorially existing within the manor of which the premises are held.

This species of heriot is said (*x*) to lie in *prender* and not in *render*; for it is not, by the terms, *a service*, or in the nature of *a rent*. It may be due on the death or alienation of a tenant for life or years, as

(*u*) See *Kitch.* 133. a. & b. & the cases there cited from the Year-books. *Co. Copyb.* f. 24. *Tr.* p. 24. 2 *Bl. Comm.* 422. ch. 28.

(*x*) *Co. Copyb.* f. 25. *Tr.* 33. & 3 *Bl. Comm.* 15. ch. 1.

well as on that of a tenant in fee-simple (*y*). It may be payable on the *death* of a tenant only, or on his *alienation* only, or on either of those events, according as the usage prescribes (*z*).

Heriot-service is always due by a particular and express *reservation* in the grant or lease (*a*); or is claimed by prescription, which implies, or supposes, or presumes, such grant containing such reservation (*b*); and therefore lies in *render* (*c*), being in the nature of a rent (*d*), or founded in ancient tenure (*e*); and, consequently, is incident to, and shall always follow, the reversion, if the grant be for a particular

Heriot-service.

(*y*) *Hil.* 21. *Hen.* VII. fol. 13. a. *pl.* 15. & see *Kitch.* 133. a. & b.

(*z*) *Vide Hil.* 8. *Hen.* VII. fol. 10 a. & b. *pl.* 3. *Kitch.* 133. b.

(*a*) *Co. Copyb.* f. 24. *Tr.* 24. 3 *Salk.* 332.

(*b*) See *Gilb. on Distresses*, 8—9. & *post.* 134. &c.

(*c*) But it seems to be now settled that it lies in *prender* also. See *Post.* & *Cro. Eliz.* 32. *Sir John Peter v. Knoll.* 1 *Show.* 81. *Parker v. Gage.*

(*d*) 2 *Keb.* 677. *Lemal. v. Cara.* 2 *Saund.* 165. S.C.

(*e*) *Kitch.* 133. b. 1 *Show.* 81. *Parker v. Gage.* *Gilb. Distresses.* 9.

estate; or the seigniory, if the grant be in fee (*f*).

It is said in some of the ancient books that this species of heriot is due only on the death of a tenant in fee-simple (*g*). But, as it is due *by reservation*, it is manifest that it may be reserved on the grant of a less estate (*h*). Perhaps a distinction may be thus made: if the heriot be claimed after the death of a tenant for life or years, who was in *by the grant of the lord*, the lord must shew the deed by which it was reserved, or otherwise prove the express reservation: but if the grant of the lands was so distant that the deed of creation cannot be shewn, nor the precise terms of reservation be otherwise proved, the lord must prescribe (*i*); for it is not

(*f*) *Roll. Abr. Heriot.* pl. I. 2 *Saund.* 165. *Lanyon v. Carne.* 2 *Keb.* 505. 677. &c. 3 *Salk.* 181. *Osborne v. Sture.* *Ibid.* 332.

(*g*) *Hill.* 21. *Hen. VII.* pl. 15. fol. 13. a. & pl. 24. fol. 15. a. *Kielw.* 84. a. & b. & see 3 *Salk.* 332.

(*h*) 2 *Saund.* 165. *Lanyon v. Carne,* &c.

(*i*) See *Gilb. on Distreesses*, 8—9. 3 *Salk.* 332. *Kich.* 134. a.

(by

(by the terms) due by custom, as it is only claimed on the death of the tenant of particular lands (*k*), and not on the death of the tenants, generally, of the manor. And as the grant must of necessity have been in fee, (for any particular estate must be of known beginning, as well as of definite continuance and termination), the heriot shall be considered as due only on the death of such tenant in fee. And no mischief could here ensue: For if the *tenant* in fee should make a grant or lease to another in tail, for life, or for years, the donee, grantee, or lessee, would be *tenant to the donor, grantor, or lessor*; and no heriot would be due on *his* death: but the *donor*, or *tenant in fee*, would still continue *tenant to the lord*; and therefore, on *his* death, the heriot would equally be due. So that the lord would not be deprived of his rightful and original heriot, nor should the heriot be multiplied in prejudice of the donee or grantee. And although the tenant in fee should thus

(*k*) *Vide Hill.* 21. *Hen. vii.* pl. 24. fol. 15. b. 16. a.

part with the possession of the premises, yet, as the heriot is an heriot-service, the premises would be still subject to a distress (*l*).

But if the tenant in fee grant to *A* for life, or in tail, *with remainder over in fee to a stranger*, so that the whole fee pass from the grantor, there *A*, the particular tenant, shall hold of the lord, and not of him who made the grant or gift (*m*).

The heriot here, then, is due on the death of that person who is tenant to the lord, and not on the death of him who is tenant to that (the lord's) tenant. And here, therefore, a distinction again arises with respect to those who take *a portion of the fee* by the *act of law* or by the *act of the party*. The donee in tail, the grantee for life, and the lessee for years, take by the *act of the party*, and do not become tenants to the lord; and, consequently,

(*l*) See post.

(*m*) *Bro. Ten.* 21. *Dyer.* 362. b. *pl.* 19. *2 Inst.* 505. *Co. Litt.* 21. b. *Godb.* 18. *Webbe & Potter.*

as we have seen, no heriot is, in such case, due on their death. The husband taking his curtesy, or the widow her dower, are in by the *act of the law*. The husband (at least in cases where he takes the *whole* estate) is tenant to the lord (*n*). The widow (except she *does* take the whole (*o*)) is tenant to the heir (*p*). It should seem, therefore, that, in the present case, the heriot would be due on the death of the former, though not of the latter. The distinction between the persons taking by act of law or of the party, does not seem to have been sufficiently attended to in the case in *Kielwey* (*q*). Mr. *Viner* has told us (*r*), that, according to *Frowike* in the case in *Kielwey*, the heriot was not payable on the death of a tenant by the curtesy. But Mr. *Viner* has not told us

(*n*) 2 *Inst.* 301. *Watk. on Desc.* 83.

(*o*) See *Watk. on Desc.* 81. & *Watk. N.* xxv. to *Gilb. Ten.* 373. & *Gilb. Ten.* 172—4.

(*p*) *Bro. Ten.* 84. & *Watk. on Desc.* 83.

(*q*) *Kielw.* 84. *a.* & *b.*

(*r*) 14 *Abr.* 296. *Heriot. (B.) pt.* 1.

that

that *Kingsmil* was of a contrary opinion (*s*); nor has he told us that *Frowike* was answered in a manner to which he could not satisfactorily reply. For the instance which *Frowike* gave of the tenant for life and remainder-man differed materially from the principal case; in that the tenant for life and remainder-man were in by the act of the party, and the tenant by the courtesy was in by the act of law. Besides, the estate for life and remainder in fee, formed, in consideration of law, but one estate; while the estate of the tenant by the courtesy could not possibly form one with the reversion in the heir.

Heriot, what. We have already seen that the heriot of the military tenant originally consisted of arms, horses, or habiliments of war; and that of the villein, ceorl, or husbandman, either of some beast used for the purposes of agriculture, or which formed part of his stock, or of some inanimate good: and as the latter (or villein heriot) is the only species of heriot now remain-

(*s*) See *Kielw.* 84. *a.*

ing

ing among us (*t*), we will here chiefly confine our remarks to it.

The most usual thing rendered as an *best animal*. heriot of the latter kind is that of the best animal of which the tenant died possessed. And in an avowry it is necessary to allege of what nature the heriot be, whether an animal or dead good (*u*).

Which is the *best* animal, in case the tenant dies possessed of several, is to be ascertained by the lord, for he may take which he pleases as such; but if he seize the one which in reality is the worst, he must be content; for it will be his own folly to make such a choice; and immediately on his election the property shall vest in him (*x*).

But,

(*t*) The military heriot must have fallen with the military tenures. See 12 Car. II. c. 24. Though, indeed, it seems to have been long before lost in the relief.

(*u*) See *Hutt.* 4. *Shaw v. Taylor.* Hob. 176. S. C.

(*x*) Hil. 16 Hen. VII. pl. 3. fol. 4—5. Hob. 60. & Bro. Har. pl. 11. Cro. Eliz. 589. *Odiham v. Smith.* But it was resolved in the latter case that, if the tenant hold

But, whatever the best beast may be, it must be remembered that it is the best beast of *his tenant* which the lord is entitled to; for he cannot seize, or prescribe to have, the best beast of *a stranger* (y):

And as it must be the best beast of the *tenant*, so it must be the best beast of the tenant *at the time of his death or alienation*. For if the property in the beast was not *at that time* in the tenant, the lord can have no title to it (z). But if the property in such beast *was* in the tenant at that time, the title of the lord is complete. And, therefore, if the tenant die on the first of January, and the lord do not seize till the first of December, the

hold by rendering *an ox* as an heriot, and the tenant have several oxen, the lord cannot take which he pleases; but the election is in the tenant, who may render which ox he will; for if the tenant do render *an ox* (whether it be the best or the worst), the render will be satisfied. & see *Plowd.* 96.

(y) *Dyer.* 199. b. *Parton v. Mason.* & *Marg.* (58).
Cro. Eliz. 715. *Parker v. Combleford.* *Moore* 16.
Wilson v. Wife.

(z) *Bro. Har.* 8. *Kich.* 135. b. 136. a. *Hutt.*
 4—5. *Shaw v. Taylor.*

lord

lord must not take that beast which may be the best on the latter day, but that which was the best on the day on which the tenant died or aliened (*a*).

If the tenant, at the time of death or alienation, have *no* beast, the lord must of necessity lose his heriot; for where there is nothing, nothing can be had (*b*). If the tenant, therefore, parted with his property in his beasts, before his death or alienation, he would have prevented the lord's claim. This was frequently done in order to defraud the lords of their rights, 'till the statute of *Elizabeth* was enacted to remedy the evil—of which statute we shall presently say more (*c*). But the tenant cannot defeat the lord of his claim *by will*, as the devise will not take effect 'till his decease, and then the lord's title

*13. Eliz.
ch. 5.*

(*a*) *Plowd. Quæries.* Qu. 64.

(*b*) *Kielw.* 84. b. *Hutt.* 4. *Shaw v. Taylor.* *Carter.* 86. 4 *Leon.* 239. pl. 377. 2 *Bl. Comm.* 424. ch. 28.

(*c*) *Post.* at the close of this chapter. *169.*

shall be preferred (*d*). The heriot, therefore, can only be taken from *the chattels of the tenant*; and is no charge on the lands (*e*), any more than a relief (*f*), or the fine of a copyholder (*g*).

Dead good.

When the heriot is of the best dead or inanimate good, a jewel or piece of plate may be taken (*h*). But it must, however, be always a *personal chattel* (*i*); it cannot be a *real chattel*, or a thing in action. And as the law, as already noticed, relative to an animate or living good, is equally applicable to the dead, it will be unnecessary to repeat it here.

(*d*) *Plowd. Quæries.* Qu. 64. Co. Litt. 185. b.

(*e*) *Bract.* lib. 2. cap. 36. f. 9. fol. 86. a. *Fleta.* lib. 3. cap. 18. fol. 212. *Britt.* cap. 69. *Fitzb. Avowrie.* pl. 233. 2 *Bl. Comm.* 424. *Co. Copyh.* f. 24. Tr. 24. But see *Hill.* 8 *Hen. VII.* 10. b. 11. a. pl. 3. *contra* as to heriot-service. & *Poff.*

(*f*) *Fitzb. Avowrie.* pl. 233.

(*g*) *Ante.* vol. 1. p. 321.

(*h*) 2 *Bl. Comm.* 424.

(*i*) *Ibid.* 424.

In some manors it is customary to pay sum certain a sum certain in lieu of heriot (*k*). But such custom, like all other customs, must be beyond time of memory; for if the lord and tenants enter at this day into a new composition, it will not bind the representatives of either party (*l*).

However, on a grant or lease made at this day, a sum certain may be reserved in the name of an heriot (*m*); for this would have no relation to any *former custom*, but be a *new render on an express reservation in the deed*.

It sometimes happens that the lord is to have an heriot of the best beast or good, or a sum certain. It is then in the election of the lord which of them he will have; and it has been thought that the lord could not distrain for the former 'till he had expressly

(*k*) *Kitch.* 103. *a.*

(*l*) 2 *Bl. Comm.* 424. *C. Copyb.* f. 31. *Tr.* 46.

(*m*) 2 *Saund.* 165. *Lanyon v. Carne.* & al. *Ex. Cara.* 2 *Keb.* 505. *pl.* 75. 677. *pl.* 59. *S.C.* 1 *Lev.* 294. *S.C.* 1 *Vent.* 91. *S.C.*

made his election (*n*): But it should seem that, by the very act of distraining his election would be made.

Sum certain, - In some manors the lord is to have the *if no beast.* best beast, if the tenant die possessed of a beast; but if the tenant have *no* beast at his death, then the best dead good (*o*); or a sum certain, as five shillings (*p*).

Heriot—due on whose death. As the reservation of an heriot, *on a particular grant or lease,* is merely the

(*n*) *Litt. Rep.* 33. 35. *Beare & Hodges.*

(*o*) "If the tenant that deceaseth dyeth, having no cattle of his owne, then to pay his best ymplement of household-stuff for the heriott." *Customs of the manor of Dymock; Co. Glo.* Or, best good. *Manors of Berkeley and Thornbury; in Co. Glo. &c.*

(*p*) " *Burgensis cu. caballo seruien. cu. moriebat. habeb. rex equum & arma ejus. De eo qui equu. n. habeb. si moreret. habeb. rex aut. X. Solid. aut terra. ejus cu. domib. Siq. morte praeuent. non duisisset quæ sua era. rex habeb. omem. ej. pecuniam.*" *Doomsd. Herefordscire. tit. Hereford Civitate.*

By the 24th law of *William the Conqueror*, the vasor, in case he had no horse or arms, was to pay one hundred shillings. "—*Sil fust des Apeille, quil ne' ont ne chival ne les armes per c. solz.*" *LL. Gul. ap. Seld. ad Eadw. Kelb. & Wilk.*

agreement of the contracting parties, it most certainly may be reserved *on any particular event*. But when an heriot is claimed by *custom*, it can only be so on the death or alienation (*q*) of a *tenant*. Tenant. To claim an heriot by custom, on the death of every *person* dying within the manor, or on that of a *stranger*, would not Stranger. be good (*r*).

But, on the death of a *tenant*, an heriot Tenant in (either by custom or service) may be *fee, for life, for years, at will*. in fee (*s*), for life (*t*), for years (*u*), or at will (*x*).

(*q*) See *Bosanquet & Puller*. C.P. 282. *Trin.* 38. *Geo.* III. *Parkin v. Radcliff*, where a custom was alleged to have an heriot on the *in-coming* of a purchaser. This (if supportable) may bear some analogy to the fine on alienation, which became payable by the feoffee. See *Watk. N.* xxxii. to *Gilb. Ten.* 377.

(*r*) *Cro. Eliz.* 725. *Parker v. Combleford*.

(*s*) *Bro. Har.* 5. See *Gilb. on Distresses*. 8—10.

(*t*) *Bro. Har.* 5. *Kich.* 133. a. 2 *Saund.* 165.

Lanyon & Carne, &c. 3 *Salk.* 181. *Osborne v. Sture*.

(*u*) *Kich.* 133. a. 2 *Saund.* 165. *Lanyon v. Carne*.

(*x*) 2 *Bulst.* 196. in *Hix v. Gardiner*.

Mesne. It is not, however, necessary that such tenant be *the tenant paravail*; for a person having the *mesnalty* may equally hold by heriot (*y*). For the *lord mesne* is tenant to the lord above, though he be lord to the *tenant paravail*.

Disseifee. If *A* disseife *B*, yet *B* will continue tenant to the lord by right; and, therefore, an heriot will be due on the death of the disseifee, and not on that of the disseifor (*z*). But, according to the distinction noticed by *Littleton, J.* in the *Year-book of 32 Hen. VI. (a)*, as the lord would be obliged to take the disseifor for his tenant, after the entry of the disseifee or his heir be tolled, it should seem that,

(*y*) *Pasch. 44 Ed. III. pl. 24. fol. 13. a.* & cited *Bro. Har. 1.*

(*z*) *Vide Pasch. 44 Ed. III. pl. 24. fol. 13. a.* 2 *Roll. Abr. Her. 2. Kich. 134. a.*

Unless the custom require a dying seized. See 2 *Lord Raym. 994. Smartle v. Penhallow. 1 Salk. 188. S.C.* But in that case a seisin *in law* will be sufficient. See *Co. Litt. 239. b. & Watk. N. xxiii. & xxiv. to Gilb. Ten. 372—3.*

(*a*) *Hill. 32 Hen. VI. pl. 16. fol. 27. & Watk. N. xxiv. to Gilb. Ten. 372.*

after

after the tolling of such entry, the heriot would be due on the death of the disseisor or *his* heir; and not on the death of the disseisee or *his* heir.

A copyholder, indeed, cannot, properly, be disseised (*b*); and, therefore, this doctrine may not be considered as strictly applicable to a person holding by copy (*c*). Yet it will at least be serviceable by way of analogy in illustrating a point which frequently occurs.

Thus, if a copyholder surrender to the Surrenderor of a copy used of another, and then die, before the hold. surrenderee be admitted; such copyholder or surrenderor will die *tenant to the lord* (*d*); and, consequently, an heriot will be due on *his* death (*e*), and not on the death of the surrenderee.

If there are several joint-tenants, an heriot shall not be due until the death of ^{Joint-ten-}_{ants.}

(*b*) *Ante.* vol. i. p. 61.

(*c*) But see 2 *Roll. Abr. Her.* 2.

(*d*) *Ante.* vol. i. p. 60. 94. 101.

(*e*) *Kich.* 135. a.

the longest liver of them. For joint-tenants are seized *per mie et per tout*; and, however many persons there are, they all make but *one tenant* to the lord. The tenancy, therefore, is not at an end by the death of one of them; and, consequently, by the death of that one no heriot can be due: the tenancy remains filled by the survivor; and the lord cannot claim the heriot till the tenancy be changed (*f*).

Sole tenant. The heriot is due only on the death of a person dying *solely seized* (*g*): hence it should seem that it would not be due on the death of a parcener (*h*); for parceners, like joint-tenants, compose but *one tenant* to the lord (*i*). If lands, therefore, de-

(*f*) *Mich.* 24 *Ed.* III. *pl.* 88. *fol.* 72. b. *Bro. Har.* 4. *Fitzb. Har.* 3. & 5. *Kich.* 134. a. & b. *Owen.* 152. *Butler v. Archer.*

(*g*) *Vide Mich.* 24 *Ed.* III. *pl.* 88. *fol.* 72. b. *Trin.* 25. *Ed.* III. *pl.* 3. *fol.* 86. a. & *Kich.* 134. b.

(*h*) See 3 *Leon.* 13. *ca.* 30.

(*i*) See 3 *Leon.* 13. *ca.* 30. & *ante.* vol. i. 277—8. 2 *Pr. Wms.* 614. *Eastwood v. Vinke. &c Co.* *Litt.* 163. b.

And they are seized *per mie & per tout*, as joint-tenants are. *Vide Liber Affiarum.* 210. b. *Pasch.* 34. *Ed.* III. *pl.* 15.

scend to two daughters (and if, in the case of a copyhold, they be admitted *as partners*, for if they be admitted *severally* it would be wholly different), and one die, the heriot would not, I conceive, be due till the *death* of the survivor, as the other was not solely seized.

But tenants in common have *several* ^{Tenants in} estates: each is *solely seized of his portion*; ^{common.} and, consequently, an heriot must be due on the death of each (*k*)

An heriot is due on the death of a re- ^{Reversioner.} versioner equally as on that of a person in possession (*l*), for he is equally in the seisin of the fee (*m*); and a reversion is a tenement as much as a particular estate (*n*).

If a person seized in fee of freehold ^{Particular} lands grant to *A* for life, with remainder ^{tenant and} ^{remainder-} ^{men.}

(*k*) See *ante.* vol. i. p. 280.

(*l*) *Pasch.* 44 *Ed.* 111. *fol.* 13. *a.* *pl.* 24. *Bro.*
Avowrie. 142. *Owen.* 152. *Butler v. Archer.*

(*m*) *Ante.* vol. i. p. 58.

(*n*) *Bro.* *Escheat.* 6. *Waste.* 40. *Dyer.* 137. *b.*
pl. 26. *Gilb.* *Ten.* 88.

to *B* for life, with remainder to *C* for life, with remainder to *D* in fee; *A. B. C.* and *D.* shall *hold of the lord*, as the whole fee is disposed of (*o*): but as the particular interest granted to *A.* and the several remainders limited to *B. C.* and *D.* form together *but one estate* (*p*), it should seem to follow that *A. B. C.* and *D.* form *but one tenant to the lord*; and, consequently, that *but one heriot can be due*; and that on the death of the survivor of them (*q*). But if either alien his portion, it should seem also that an heriot would be due on the alienation of each; *as the respective alienors would cease to be tenants by their own act*; and the respective alienances would be in of a new estate.

Person having an intereste
termini.

If two leafes be made of the same lands, the seconde to commence on the determination of the first, and the lessee of the seconde die during the continuance of the first lease, it seems that an heriot will

(*o*) See *ante.* p. 136.

(*p*) *C. Litt.* 143. a.

(*q*) See *Kielw.* 83. b. 84. a. *pl. 7. & 8.* & *Quære de hoc.*

not be due on his death; as he had only an *interesse termini* (r).

So an heriot is not due on the death of *Cestuy que trust*; for it is not the *Cestuy que trust* but the trustee that is the tenant to the lord: on the death of the trustee, therefore, and not on that of the *Cestuy que trust*, shall the heriot accrue (s).

On the death of a feme covert the *Feme covert*. lord can have no heriot; as she can (as such) have no personal chattels (t).

If a female tenant marry, and the husband die in her life-time, no heriot can be due on *his* death; for the feme will continue tenant (u).

(r) 2 *K.b.* 505. 677. *Lemal v. Cara.* 2 *Saund.* 165.
S. C. 1 *Vent.* 91. S. C.

(s) 1 *Vern.* 441. *Trinity College, Cambridge, v. Browne.* & see 3 *Atk.* 77. in *Car v. Ellison.*

(t) *Kielw.* 84. a. & b. 4 *Leon.* 239. *Ca.* 377. &
2 *Bl. Comm.* 424. where the same books are cited.

But this reasoning will not hold in cases where she has a *separate estate*.

(u) *Plowd. Quæries.* Qu. 64.

It is not the husband alone who, on marriage, is seized in the right of the wife, though so said in common language; but the husband *and* wife are seized *in her right* (*x*). They are seized *by entireties*; and, consequently, on the husband's death, the seisin *remains in the wife* (*y*). The *estate* was in *her*, even during the *couverture* (*z*). There is *no change of the tenancy* on *his* death.

Tenant by
the curtesy.

But if the wife die in the life-time of the husband, and the husband be entitled to his curtesy, an heriot would be due on his death; as *he* would *then* die *tenant to the lord* (*a*).

Dowress.

When the widow takes her dower *of freehold lands* at common law, she becomes *tenant to the heir*, and not to the lord (*b*);

(*x*) *Dougl.* 329. *Polyblank v. Hawkins.* *Plowd.* 191. a.

(*y*) See *Co. Litt.* 185. b. *Plowd.* 418. b.

(*z*) *Co. Litt.* 351. a. 2 *Inst.* 301.

(*a*) See *ante.* p. 137.

(*b*) *Ante.* p. 137. Unless there be no heir; and in that case the widow shall hold of the lord: See *Wat. on Desc.* 83. N. (*n*).—and it should seem that an heriot would *then* be due.

and,

and, consequently, an heriot cannot be due to the lord on *her* death. The heir continues tenant to the lord for the whole of the premises; and the widow shall be attendant on such heir for the third of the services (*c*).

But where the widow takes *the whole*, (Freebench), at least, of a copyhold as her freebench, *she* becomes *tenant to the lord* (*d*): and it should seem that she equally becomes *tenant to the lord* if she takes *a portion only* of the lands; as a moiety or third (*e*). For there is a difference, with respect to the creation of a tenure, between a freehold and copyhold interest: if a freeholder, seized in fee-simple, grant to another for

(*c*) *Watk. on Desc.* 83. & notes.

(*d*) See *Gilb. Ten.* 172—3. *Watk. Ed.*

(*e*) See *Gilb. Ten. ubi sup.* & 2 *Show.* 184. *Chapman. v. Sharpe.*

Whatever portion she takes it is called her *freebench*, which implies that she becomes a *bencher*. Now if she has a right to sit as a *bencher*, or on the homage, she must be *tenant to the lord*; for none but *tenants to the lord* have a right to sit in such capacity in the lord's court. See *ants.* p. (69).

life or years, the grantee shall hold of the grantor; but if a copyholder, seized in fee-simple, create a particular interest, as for life or years, the latter shall hold of the lord, and not of the copyholder (*f*). And I believe there is no instance in which the copyholder can create an interest, by right, to be held of himself, except by a lease for years by custom or license; and then the interest created by such lease would be *a common law*, and not *a copyhold*, interest (*g*); and the *copyholder* would continue *tenant to the lord*.

Now a widow taking a portion of the copyhold as her freebench, or an husband taking a portion as his *curtesy*, would not take a common law but *a copyhold interest*; and, by consequence, must hold that interest by *copy of court-roll*; and by consequence of the manor, or of the *lord, as lord*; and, by consequence, must be *tenant to the lord*; and, by consequence, an heriot must be due on *her or his death*.

(*f*) *Cro. Car.* 44. *Gilb. Ten.* ubi *sup.* & *ante.*
vol. i. 155.

(*g*) *Ante.* vol. i. p. 301—2.

Though

Though a corporation is immortal and Corporation. cannot die, yet it is said (*h*) that, by spe-
cial custom, an heriot may be due on the
death or avoidance of its head.

Before we dismiss this subject we must Several tene-
remark, that if a person has several tene- ments.
ments held of the same manor, which are
heriotable, he must pay an heriot for
each (*i*).

An heriot may not only be due on the Heriot on
death of the tenant, but also on the aliena- alienation.
tion of the tenancy. Though it does
not follow, of necessity, that because it is
due in the first instance, it is therefore due
in the latter: a special custom, or an ex-
prefs or presumed reservation, must be

(*h*) *Long Quinto. Mich. 5 Ed. IV. fol. 72. b.—*
Vide Fitzb. Hariott. 7.

(*i*) *Kich. 134. a. & vide ante. vol. i. p. 303. 316.*
6 Co. 1. Bruerton's case.

Unless there be a custom to the contrary. Thus in
the manors of *Mayfield & Framfield*, in *Sussex*, but one
heriot is due by custom, though the tenant die seized
of several tenements.

proved, or the heriot on alienation cannot be claimed (*k*).

Cession of
the tenancy.

As the heriot on death can only be due on the death of a *tenant*, so an heriot on alienation can only accrue on the actual change, or, more properly, the actual relinquishment or cession of the *tenancy*. If the tenancy be not changed or relinquished, the heriot cannot be due.

And here the difference before noticed (*l*), with respect to the creation of a tenure in the cases of freehold and copyhold property, must be attended to. The donee or grantee of a particular interest shall, *in the case of a freehold*, hold of the donor or grantor, and not of the lord. The tenancy, with respect to the lord and donor, is not changed; is not relinquished or in any wise affected: *the donor is still tenant to the lord, and answerable for the*

(*k*) *Kich.* 133. a. & b. 134. b. 135. b. See *ante.* p. 145. of an heriot being claimed on the *in-coming* of a tenant.

(*l*) See *ante.* p. 136. 153,4.

services of the whole fee. It should seem, therefore, that such heriot cannot be due on the gift or grant of a particular interest of the freeholder, but only on his *alienation in fee-simple*; which, in truth, can now be the only strict and proper *alienation*; as, in that case alone, *the tenancy* would be altered or relinquished (*m*).

With respect to *the copyholder*, it is ^{of copyhold.} wholly different. *He* cannot (unless, indeed, in the anomalous and monstrous case of a *manor* held by copy) (*n*), give or grant any portion of his estate *to be held of himself*; except, as before observed, a common law interest for years by license, which can have no relation to our present enquiries. *He* can only transfer such portion by surrenderring it into the lord's hands; and the person taking that portion becomes immediately, on his admission, (and, *till admission*, he does not properly take it) (*o*), *a tenant of the lord*. Though

(*m*) See *Gilb. Ten.* 66. & *Watk. N.* xxxvii.
p. 391. & *N. LIV.* p. 400.

(*n*) *Ante.* vol. i. ch. 2. p. 32.

(*o*) *Ante.* vol. i. p. 86. 100.

the original copyholder, therefore, continues tenant to the lord *as to his reversion*, he has absolutely relinquished his tenancy *as to the particular portion*; he is no longer tenant of *that*. He is not, like the freeholder, answerable for the *particular services*. A *new* tenancy is created: the portion surrendered is no longer a portion of the *original tenancy*, as in the case of a grant for life of freehold lands. It should, therefore, seem that an heriot would be due (where an heriot on alienation is due by custom) *on the surrender of a particular copyhold interest*, however small.

Reversion.

And it should seem also that, though a new tenancy be created as to the particular portion, yet, as the original copyholder would continue tenant as to his reversion (*p*), an heriot would be equally due on the alienation of such reversion as on that of an estate in possession. But there is a remarkable paucity of cases on this subject in our books.

(*p*) *Ante.* 149. & *Owen.* 152. *Butler v. Archer.*

Having

Having spoken of an alienation of part of the *estate* or *interest*, we must next consider the consequence, as to this point, of an alienation of part of the *lands*.

And it appears to be on all hands agreed, that on the alienation of part of the lands the heriot shall be multiplied. For if *A.* be seized of forty acres of land, and he alien ten acres to *B.* and ten acres to *C.* and ten acres to *D.* and retain the other ten himself, the lord shall have four heriots, *i. e.* one on the alienation to *B.* one on that to *C.* a third on that to *D.* and a fourth on *A.*'s alienation of the remaining ten acres (*q.*) . For, though *A.* continues tenant to the lord as to the remaining ten acres, he has ceased to be tenant of those he has aliened; in the same manner as the copyholder ceases to be tenant as to that portion of the estate which he surrenders to the use of another.

(*q.*) *Fitzb. Hariott.* pl. 1. *Kich.* 134. a. 135. b.
6 Co. 1. *Bruerton's case.* 8 Co. 104. b. *Talbot's
case.* 2 *Brownl.* 293. *Chapman v. Pendleton.*

And

Though the
original te-
nant re-pur-
chase.

And even if *A* afterwards re-purchase the lands from *B. C.* and *D.* the four heriots will continue to be payable (*r*).

Extinction
by purchase
of the lord.

If the lord purchase part of the lands; it will extinguish the *heriot-service* as to the whole; but an *heriot-custom* will be due on the death or alienation of the tenant as to the remaining part; for he will still continue a tenant as to that part to the lord (*s*).

On escheat,
&c.

If the lands escheat, or in any other way return to the lord, it seems agreed that *heriot-service* shall be absolutely extinct (*t*). And, by the bye, it would be odd enough to think that it should not. For how shall the services continue longer than the tenancy for which they were to be ren-

(*r*) *Fitzb. Hariott.* pl. 1. 8 Co. 105. a.

(*s*) 8 Co. 106. a. & b. *Talbot's case.* Co. Litt. 149. b. 2 *Brownl.* 293. *Chapman v. Pendleton.* Gilb. *Rents.* 171—2.

(*t*) *Vide Mich.* 14. *Hen.* iv. fol. 5. a. & b. *Kich.* 134. b. 8 Co. 106. *Talbot's case.* 2 *Brownl.* 296. *Chapman v. Pendleton.*

dered? If there be a new grant there must be a new reservation.

But it should seem to be the better opinion that heriot-*custom* would not be extinct on an unity of possession: so that if the lord, after such escheat, &c. re-grant the lands, they would still be subject to an heriot-*custom* (*u*). Though it should not be forgotten that, if the lands be *freehold* lands, and the lord re-grant them *in fee*, no heriot can possibly be claimed *by him* afterwards: for by the re-grant in fee the lands would be immediately separated from, and no longer held of, that manor by the custom of which the heriot is claimed, as they would be held of the lord above (*w*).

But if the lands be *copyhold* and re-granted, though in fee, it should seem that, immediately on such re-grant, they

(*u*) *Kich.* 134. b. *Talbot's case*, & *Chapman v. Pendleton*, *ubi. sup.*—*Vide Hill*, 8 *Hen. VII. pl. 3.* fol. 10. b. 11. a.

(*w*) See *Ante. vol. I. p. 367—8*, and the books there referred to; and *Litt. f. 215.*

would become subject to the custom. For what reason can be given why the custom as to heriots should, in such case, be gone, any more than the custom as to fines, &c. which would undoubtedly continue? (x).

The property in an heriot becomes immediately vested in the lord;

Who may bring trover &c. for it.

If the best beast or good be due to the lord on the death or alienation of his tenant, the property in it becomes vested in the lord immediately on such death or alienation, whether the heriot be an heriot-custom or an heriot-service (y). And, consequently, he may seize it wherever it may be found, or bring trover (z) or detinue (a) against the person esloigning or detaining it: and, if it be reserved on a grant or lease, he may have an action of debt or covenant (b).

(x) See *Ante.* vol. i. ch. 2.

(y) *Vide Bro. Hariott.* pl. 2. *Plowd.* 96. & post.

(z) 1 *Show* 81. *Parker v. Gage.*

Trover lies for an estray before actual seizure, *per Keeling*, C. J. 2. Keb. 589. *Wilbraham v. Snow.*

(a) *Bro. Har.* pl. 9. *Kich.* 133. b. 135. b. Co.

2. 22. Copyb. S. 31. Tr. 44.

(b) 2 *Saund.* 167. *Lanyon v. Carne.*

See 2. Yes. 398. The lord may bring his bill in equity for a discovery of the best beast, &c. 1 *Vern.* 441. *Trinity College Cambridge, v. Browne.*

Huk. 1. Ch. long. sec. word 1. eq. 1. interdict. It is in favor of heriots, *Thos Wm. Comberston v. Ann 2. Eq. 1. br. 1. 2 ed. 2. 79.*

It appears to be now settled that the *Seizure*. lord may seize for heriot-service as well as for heriot-custom (*c*) ; though contrary to the distinction in the ancient books.

And, as the property in the best beast or good becomes vested in the lord on the death or alienation of the tenant, he may seize it wherever it may be found, as well without his seigniory as within ; and that whether the heriot be due by custom or as a service (*d*).

But in the case of *Parker v. Gage* (*e*), it is said to have been held by *Holt*, C. J. that an heriot (which is there called a *suit-heriot*) reserved by *deed*, and not due by reason of *ancient tenure*, cannot be taken off the manor. Yet I must confess

(*c*) *Plow.* 94. *Woodland v. Mantel & al.* & the books cited in note (*g*) p. 97. of the English edition. *Co. Copyb.* S. 31. Tr. 44.—*Gilb. Distresses*, 10—11. *3 Bl. Comm.* 15.

(*d*.) *Kielw.* 84. b. *Plowd.* 96. *Fitzh. Har.* 4, 5.—*1 Salk.* 356. *Austin v. Bennet.*—*1 Show.* 81. *Parker v. Gage.*

(*e*) *1 Show.* 81. ca. 86.

that I cannot see the propriety of such distinction ; nor the reason for a distinction between a *suit-heriot* and an *heriot-service*. By saying that such *suit-heriot* cannot be taken *off* the manor, it seems to imply, at least, that it might be taken *within* the manor. Now, if the lord would be justified in seizing it within the manor, the property must have been vested in him ; for otherwise he could not be warranted in seizing it at all. A person cannot be warranted in seizing the chattel of another. Nay, if he do seize the chattel of another, he would be subject to an action of trespass (f). He can only seize his own chattel : but his own chattel, however he became entitled to the property in it, he most certainly may seize, wherever it may chance to be.

However, a person must seize his chattel in a peaceable manner ; he must not do so with force of arms. He cannot be justified in breaking open a private stable, *a fortiori* a dwelling-house, nor even in

(f) *Post. p. 167.*

entering

entering on the premises of a third person, unless the chattel be feloniously taken (*g*) ; but he must have recourse to an action at law (*h*).

While the property, therefore, continues in the lord, he may peaceably seize ; but his right to seize must necessarily be at an end on the transfer of that property to another. If an horse or ox fall to the lord as an heriot, and the executor of the deceased tenant, or any other person, take and sell it in *market overt*, the lord cannot afterwards be warranted in seizing it, as the property would be changed by such sale (*i*). But, with respect to the former animal, the requisites prescribed by the statutes of *Philip & Mary* and *Elizabeth* must be complied with, or the property will not be out of the lord (*k*).

(*g*) 2 *Roll. Rep.* 55. *Higgins v. Andrews.*

(*h*) See 3 *Bl. Comm.* 4—5.

(*i*) *Fitzb. Har. pl. 2.*

(*k*) 2 *Inst.* 713.—*Burn's Just. tit. Horses. sect. 2.*

2 *Bl. Comm.* 450. *Ch. xxx.*

The lord may seize by his bailiff or other officer of the manor (*l*) ; and it has been said, that even a stranger may seize to the use of the lord (*m*).

But the lord can only seize the beast or good which was his tenant's at the time of the tenant's death or alienation ; and therefore it will be a good plea in avowry to say, that the property in it was not in the tenant at the time of that event (*n*). So the lord cannot seize the beast of a *stranger* ; even if he allege a special custom to seize such beast being *levant et couchant* on the lands, in case of the deceased tenant's beast being esloigned (*o*). But if the lord finds a beast upon the lands of which his tenant died possessed, and seizes it, the person repleyng it must show that it was not the tenant's beast (*p*).

(*l*) *Fitzb. Har.* 5. *Termes de la Ley*, tit. *Hariot*.

(*m*) *Per Keble; Pasch.* 2 *Hen. vii.* pl. 1. fol. 15. b.

(*n*) *Kich.* 135. b. 136. a.

(*o*) *Dyer.* 199, b. *Parton v. Mason. Moore.* 16. *Wilson v. Wise.* Though some of the old books are otherwise, even as to an heriot custom. *Vide 27. Aff.* pl. 24.

(*p*) 1 *Mod.* 63. *Jordan v. Martin, per Twisden.*

If the lord seize a beast as an heriot where no heriot is due, the owner may replevy, or have an action of trover or trespass against him (*q*).

But if the tenant had no beast, and the lord enter to seize for an heriot, conceiving that the tenant had beasts at his death, and the executor of the deceased tenant deliver his own beast to the lord, it shall be considered as a gift ; and the executor, it is said, shall not be permitted to say afterwards that it was not the beast of the deceased, and that, therefore, the lord had no right to it (*r*).

It seems to be settled, that the lord can- Distress.
not distrain for heriot-*custom*, but that he
may for heriot-service (*s*). And that for

(*q*) *Cro. Jac. 50. Bishop & al. v. Viscountess Montague.*

(*r*) *Mich. 7. Ed. III. pl. 26. fol. 50—51.*

(*s*) *Bro. Har. 2, 6, 7, 9.—Kich. 133. b. &c.—3 Bl. Comm. 15.—Gilb. Distresses, 10—11.*

And an avowry for such distress is not within the statute 31 Hen. VIII. c. 2. an heriot being a casual service. 2 Inst. 96. 4 Co. 8. b.

HERIOTS.

heriot-service he may distrain any goods he can find upon the lands charged with such service, whose-ever property they may be (*t*). But, according to the old law, it is said he could not distrain after the term on which the heriot was reserved ended: yet *quære* whether this be not helped by the statute of *Anne* (*u*); as an heriot-service is as a rent (*x*); and a rent need not be annual (*y*).

Alienation to defraud the lord. It has been already remarked, that if the tenant has no beast, or other good, at the time of his death, &c. the lord must, of consequence, be deprived of his heriot: hence, in order to prevent the claim of the

(*t*) *Bro. Har.* 6. *Cro. Car.* 260. *Major v. Brandwood.* 1 *Salk.* 356. *Austin v. Bennet. Kich.* 133. b. *Gilb. Distresses,* 10—11.

(*u*) 8 *Ann. Cap.* 14. S. 6 & 7.

(*x*) *Ante.* Of Heriot-service.

(*y*) *Co. Litt.* 47, a. 1 *Vent.* 91. *Lion v. Carew.*

Note; A *Distress* for heriot-service is within the statutes, 7 *Hen. VIII. cap.* 4. 21 *Hen. VIII. cap.* 19. & 11 *Geo. II. cap.* 19. as to costs. See *Cro. Eliz.* 257. *Hastlip v. Chaplen;* & *ibid.* 330. S. C. *Cro. Jac.* 28. in *Mackworth v. Shipward. Barnes, C. P.* 148. *Lloyd v. Winton.*

lord,

lord, the tenant sometimes aliened his chattels before that event. But it is enacted by the statute 13 *Eliz. cap. 5.* that all gifts, grants, alienations, conveyances, &c. devised and contrived of malice, fraud, covin, collusion, or guile, to the end, purpose, and intent, to delay, hinder, or defraud the lord of his heriot, shall, as against such lord, his heirs, executors, &c. be utterly void.

But as, till the death or alienation of the tenant actually take place, the lord can have no title to any beast or good of the tenant as an heriot, but the property in the chattels of the tenant must remain in himself, such tenant has, undoubtedly, a right to dispose of them as he pleases; unless (as to the present case) it be apparent that he would dispose of them “to the end, purpose, and intent, to defraud the lord of such heriot.” If such disposition be not to such end, purpose, and intent, and so found by the jury, it cannot be within this statute of *Elizabeth.* And, consequently, as fraud shall never be intended or presumed, such disposition must be

be proved to have been made to the end, and for the purpose, of defrauding the lord of his heriot; or the lord, or person alleging such fraud, cannot avail himself of the statute (z).

If a tenant hold several tenements of several lords, which are heriotable (*i. e.* for example, rendering *one* heriot to each of the respective lords), and he have twenty horses, and make a fraudulent gift of those twenty horses to another person, it is said that each of the lords may have a separate action, *qui tam*, on the statute of *Elizabeth*; but shall recover only the value of one beast; or, as *Dyer* expresses it, he shall “recover according to his grievance” (a). But the statute expressly says that the offender shall forfeit the value of the whole of the chattels so fraudulently conveyed, half to the crown and half to the party or parties grieved. Now, if the action brought be a *qui tam* action, the whole

(z) 2 *Brownl.* 187. *Tyrer v. Littleton.* 10 Co. 56. a S. C. cited.

(a) *Dyer* 351, b. *Grefwell v. Cakes.* 2 *Leon.* 8. S. C.

penalty

penalty inflicted by the statute must surely be recovered, or none at all. If one lord only bring his *qui tam*, and recover the value only of one horse, is the crown to be content with the half of the value of that one horse till another lord shall chuse to bring another action? Is the person who fraudulently conveys to be harassed with twenty *qui tams*? This would be a *punishment* with a witness. But the *forfeiture* would be no punishment at all *to the offender* in such case; but to the lord, who has been already sufficiently aggrieved: since the lord had a right to the whole horse, and the tenant no right to the horse at all; and, consequently, if the moiety of *that* horse was to be forfeited to the crown, it would be a confiscation of the property of the party injured rather than of the party offending. It should seem, therefore, that a distinction should be observed with respect to an action *qui tam*, and an action merely for the recovery of a particular heriot: thus, if the tenant make a fraudulent gift of his twenty horses, the lord may bring a *qui tam* against the *alienor*, (for he it is that is the aggressor)

gressor) and shall recover the moiety of the value of the twenty horses, according to the express provision of the act: but if each lord choose to bring his action of *trover*, *detinue*, or on the case, against the person in whose possession the horses are, (for the statute declares the gift to be void, as against the party aggrieved; and, by consequence, the property will be in the lord, as before noticed) (b); each lord shall recover the value of the horse he claims, or “according to his grievance.”

(b) *Ante* p. 162.

CHAP. VII.

OF SUIT.

THE obligation on the copyholder to do suit to the customary court of the manor has been already noticed (*a*). We will now, therefore, proceed to enquire who may be such a copyholder as is compellable to do suit?—the manner of performing it?—and the powers and remedies which the law has given to the lord to compel such performance, or to punish the default?

And, in the first place, we must remark that every person who holds *by copy*, however small the interest he claims, must hold *of the lord* (*b*). If a copyholder seized in

Who shall do
suit in the
customary-
court, and
who not.

A person
holding a
particular
interest *by*
copy;

(*a*) *Ante.* ch. i. Of Courts.

(*b*) See *ante.* ch. iii. Of Freebench. & ch. vi. Of Heriots.

fee surrender to the use of *A. B.* for life, *A. B.* shall not hold of the surrendor, as he should have done of his grantor had the estate been of freehold land, but he shall hold immediately of the lord: and, consequently, as he becomes tenant to the lord, he shall do suit at his lord's court: And so of a *copyholder* for years (*c*).

But not the
lessee of a
copyholder.

But if a person holding by copy lease his copyhold at will, or for a year without license, or for a longer term, if the custom of the manor permit, or, if not, by license, the lessee shall not do suit; for he takes a common law, and not a copyhold, interest (*d*): and, consequently, not being a customary tenant, he can owe no suit to the customary court.

Women.

A woman copyholder shall do suit if she be sole (*e*), or a widow (*f*); but if she be under coverture, her husband shall per-

(*c*) See *ante.* vol. i. p. 242—3.

(*d*) See *ante.* vol. i. p. 242. 301.

(*e*) *Ante.* vol. i. p. 275. N. (*m*).

(*f*) *Ante.* vol. i. p. 274. & vol. ii. p. 69, &c.

form it for her (*g*). So the widow shall do suit for her freebench (*h*), and the husband ^{Curtesy.} for his curtesy (*i*).

But it should seem that an infant shall ^{Infant.} not do suit: for he cannot do it in person; nor does it appear that he can perform it by his guardian (*k*). Yet *quære* whether he is not compellable to do it in person so soon as he is out of ward by the custom of the manor, though he should not be one-and-twenty years of age: as an infant is certainly of years of discretion at fourteen, and permitted in the common law courts to be sworn, on many occasions, at that age, and, consequently, indictable for perjury; and it should, therefore, seem that he may forfeit his copyhold before twenty-one for default of suit (*): for this differs

(*g*) *Ante.* vol. i. p. 274.

And in ancient rolls the husband is frequently mentioned as sitting on the homage in right of his wife.

“ *Homagiu:*—Ric: Wood—in *Jure Uxor:* } *Jur.*”
Stephus: Fox—in *Jure Uxor:* }

(*b*) *Ante.* ch. iii. Of Freebench. p. 69.

(*i*) *Ante.* p. 69. 71—2.

(*k*) *Ante.* ch. iv. Of Guardian. p. 106.

(*) *Ante.* vol. i. p. 337,8.

from default of admittance; since, before the statute 9 Geo. the lord might, for default of admittance, have seized *quousque* (*l*), and so be at no loss; but here the tenancy is full.

*Heir, before
admittance.*

An heir shall not be sworn upon the homage before admission; for before admission he is not a tenant to the lord. However, if the lord or steward chose to swear him it should seem to imply an admission (*m*).

The king.

Though the king should be supposed capable of being a copyholder, yet he should not do suit; as it would be inconsistent with the majesty of his character (*n*). But the king cannot be another man's villein.

*A corpora-
tion.*

So a corporation cannot do suit (*o*); as it must appear by attorney; and an at-

(*l*) *I Lev.* 63. Earl of *Salisbury*'s case; & *ante*. vol. i. p. 234. & vol. ii. p. 97.

(*m*) *Ante.* vol. i. p. 246.

(*n*) *Ante.* vol. i. p. 31.

(*o*) *Ante.* vol. i. p. 31. 242.

torney shall not do suit in a customary court (*p*). Suit cannot be done by attorney.

But although suit shall not be done in a *Essoign*. customary court by another, yet a copyholder may be *essoigned* by attorney (*q*).

If the copyholder do not appear on a *Suit* compelled under personal summons, or be duly *essoigned*, ^{led under} *forfeiture*; he shall *forfeit* his copyhold (*r*).

So the lord may *distrain* his copyholder ^{By distress}; for non-performance of suit (*s*). But such distress cannot be sold (*t*).

So the copyholder may be amerced for ^{By amercia-} not performing his suit (*u*). But such ^{ment}.

(*p*) *Ante.* ch. iv. Of *Guardianship*. p. 106.

(*q*) *Ante.* ch. i. Of *Courts*. p. 33.

(*r*) *Ante.* vol. i. p. 330.

(*s*) See *Gilb. Diff.* 5. *Co. Litt.* 150. b. 151. a.

¹ *Roll. Abr.* 665. *Distress*. (E). pl. 1.

(*t*) ¹ *Bulst.* 52. *Hewit v. Norberrow*.

But it cannot be excessive. See ³ *Bl. Comm.* 12.

(*u*) See *ante.* ch. i. Of *Courts*. p. 29. ¹ *Leon.* 104.
Sir *John Braunche's case*.

amerciament must be affeered by the other copyholders (*x*).

Dispensation
of the for-
feiture.

Though if the lord distrain or amerce, it will be a dispensation of the forfeiture (*y*).

Monstraverunt.

But a *monstraverunt* will not lie for a copyholder who holds at the will of the lord in ancient demesne (*z*). , And if a copyholder sue out a replevin against his lord, upon the lord's lawful distres for services, it will be a forfeiture *ipso facto* (*a*).

Compound-
ing suit.

It is said by *Kichin* (*b*) that the copyholder may compound with his lord *pro secta relaxanda*.

Suit by te-
nants in
common, co-
estates.

Tenants in common, having several estates, must, of consequence, severally

(*x*) Compare *Mag. Carta*, cap. 14. & 3 Ed. 1. cap. 6. *Westm.* 1.

(*y*) Sir *John Braunche's* case, *ubi sup.* *Ante.* vol. i. p. 352.

(*z*) *F. N. B.* 14. D. & 16. E.

(*a*) *Galtb.* 68. *Co. Copyb.* f. 57. *Tr.* 133.

(*b*) 74. a.

do suit (*c*): but coparceners (when admitted as coparceners) and joint-tenants, taking but one estate, shall do but one suit (*d*). If one coparcener or joint-tenant of copyhold lands, therefore, do suit, the others must of course be justified in not performing any. But it does not appear that they are within the statute of *Marlborough* (*e*) to compel contribution.

(*c*) *F. N. B.* 162. *D.* 6 *Co.* 1. b.

(*d*) *Vide Stat. Hib.* 14. *Hen.* III. 6 *Co.* 1. a. & b.

(*e*) *Cap.* 9. (52. *Hen.* III.) See *F. N. B.* 162.
B. 2 Inst. 117.

CHAP. VIII.

RENT.

IF the tenant *wilfully* and *absolutely* refuse to pay his rent, it will be a forfeiture of his copyhold; but not otherwise (*a*).
 Forfeiture for non-payment.

Distress. But the lord if he pleases may distrain for it (*b*); even upon the copyholder's lessee (*c*); as the lands are chargeable while in the hands of the copyholder, or any claiming under him; but they are not chargeable in the hands of a new tenant for the rent unpaid by his predecessor (*d*).

(*a*) See *ante.* vol. i. p. 330—1.

(*b*) 1 *Roll. Abr.* 665. *Distress.* (E). pl. 1. *Co. Litt.* 142. a. 150. b.

(*c*) 2 *Brownl.* 279. *Rivet v. Downe.*

(*d*) 1 *Roll. Abr.* 374. *Chancerie.* (P). pl. 1. *Hitcham v. Finch et al.*

Nor shall the lord be relieved in equity after he parts with the manor for rents due before his alienation (*e*). Lord has no remedy for arrears after parting with the manor.

Q.

It has been already observed (*f*) that the lord cannot vary the ancient rents: and these ancient rents, which have been paid immemorially, are sometimes called *rents of assize* from their being *certain* (*g*); and for which the lord may distrain of common right; a distress being incident to every service; and it should seem such distress would be within the statute 4 Geo. 2. c. 28. s. 5. as that statute mentions expressly rents of assize; and I see no reason why it should be confined to rents of assize issuing out of freehold property (*h*).

(*e*) 1 *Roll. Abr.* 374. *Chancerie.* (P). pl. 1. *Hitcham v. Finch et al.*

But *quære* whether he may not bring *debt*. See *Gilb. Ten.* 308—9. & *Harg. N.* (1). to *Co. Litt.* 57. b.

(*f*) *Ante.* vol. i. p. 48.

(*g*) 2 *Inst.* 19.

(*h*) See *Watk. N.* cl. to *Gilb. Ten.* p. 468.

But the rents within the statute of the fourth of *George* the Second are those only which were duly answered and paid for the space of three years within the space of twenty years before the twenty-third day of *January* one thousand seven hundred and twenty-seven, or thereafter created; yet it should seem that if the *usual* or *accustomable* rent be reserved, it must be proved by the other party that it was *not* so duly answered and paid; as the contrary would be presumed (*i*).

Action.

But an action will not lie on the statute of 32 *Hen. 8. c. 37.* for arrears of rent payable for copyhold tenements (*k*). Nor can the executors under that act distrain for such arrears (*l*).

Avowry.

The lord may avow for his rent in the

(*i*) See 3 *Co. 9. a.* *Heydon's case.*

(*k*) 1 *Brownl.* 102. *Apleton v. Baily.*

(*l*) *Bull. N.P.* 57. but see *Gilb. Ten.* 186—7. & *Quare.*

courts at *Westminster* (*m*) ; but quære whether he can bring debt for it (*n*), while the tenancy continues.

(*m*) *Cro. Eliz.* 524. *Laughtter v. Humphrey.* *Gilb. Ten.* 308.

(*n*) See *Gilb. Ten.* 308—9, & *Harg. N.* (1). to *Co. Litt.* 57. b.

CHAP. IX.

CORPORAL SERVICES.

ANCIENTLY it was usual for copy-holders to perform corporal services; as to plough the lord's lands so many days in the year, or to carry in his corn, or the like: and the remembrance of such services is still preserved in several manors in the kingdom. In many places the tenants still assemble with their teams, &c. on certain days, which are usually denominated *boon* or *due days*; but the ceremony is now chiefly formal.

It may, therefore, suffice to say that the lord may enforce a performance of them, if so inclined, when they are really due, by the usual means of distress, or seizure of the lands as a forfeiture, as he may for any other service.

CHAP.

CHAP. X.

OF STATUTES.

WHEN the legislature enacts a general law it expects a general compliance: the rule is prescribed to the subject, and the subject should regulate his conduct accordingly. The inference, of necessity, must be, that all persons and all kinds of property are comprehended within its injunctions, unless an exception in their favour can be satisfactorily adduced. If no acknowledged right or tolerated usage be infringed, if no injury arise to the privileges or property of an individual with whom it did not intend to interfere, there can be no reason why its rules and obligations should not attach. If, indeed, the consequences of its extension to particular persons

persons or places would be attended with injury to their rights or privileges, such law cannot then be *presumed* to embrace them. In those cases it would be requisite that such law should *expressly* include them; as the laws can never be *intended* to do injury to any. If, therefore, the interest of the lord be not prejudiced; if no injury accrue to the copyholder any more than, under the same circumstances, would accrue to the free; copyhold tenements must, equally with freehold, be within the public acts of the state (*a*).

If a statute speaks of “*lands, tenements, and other hereditaments*,” it seems to follow, of necessity, that it must extend to copyholds; unless the injury, consequent on such extension, be manifest. It cannot, surely, be requisite to shew that no such injury can arise before the statute can attach; but the injury must be proved in order to bring them without the statute. If the statute expressly applies to “*lands,*

(*a*) *Watk. N. LXXVIII.* to *Gib. Ten.* p. 417. 3
Rep. 8. a. . *Heydon's case.*

tenements, and hereditaments," and copyholds are “*lands, tenements, or hereditaments,*” it, certainly, must be necessary to adduce some reason why the statute should be so far contradicted as to warrant us in saying that, notwithstanding the express words of the statute, and notwithstanding copyholds are “*lands, tenements, or hereditaments,*” they shall not be within its provisions. But, indeed, this seems to be now acknowledged (b).

Should a statute, indeed, ordain that the “*lands, tenements, and hereditaments,*” of a person convicted of treason or felony shall be forfeited to the *king*, the injury which the lord would sustain, were copyholds within that statute, would be strongly apparent; and, most unquestionably, it could never be the intention of the legislature to punish a person who had no share in the crime.

(b) *Carth.* 205. *Glover v. Cope.* & see *Cowp.* 705.
Doe v. Routledge. & *Dougl.* 716. N. [1]. S. C.
cited.

An argument is urged in the case of *Harrington v. Smith* (*c*), against the opinion that copyholders shall be bound by an act of parliament, that they are not parties to such act; having no vote in the election of knights. But, though this argument is ingenious, it is not very formidable; for, if it would prove any thing, it would prove too much; and so be *felo de se*: it would prove, that as copyholders are not parties to any act (unless, at least, they are expressly named); while it is acknowledged on all hands that they are within the purview of several.

A statute, it seems, may extend to copyholds in some of its provisions and not in others; so that copyholds may be included in one part, and not in another part, of the same act. Thus the first chapter of the statute of *Merton*, relative to damages in dower, has been adjudged (*d*) to extend

(*c*) 2 *Sid.* 43. & see *ibid.* 74.

(*d*) 4 *Cb.* 30. b. *Shaw & Thomson*; & *ante.* ch. iii.
Of *Freebench*. p. 91.

to copyholds, while the tenth chapter of the same statute of *Merton*, relative to attorneys to do suit, has been adjudged (*e*) not to extend to them. So the sixth section of the statute 32 *Hen. 8. c. 28.* which gives an entry instead of a *cui in vitâ*, has been said to extend to copyholds, though the other parts of that statute do not extend to them (*f*).

Copyholds are within the first chapter of the statute of *Merton*, which is relative to damages on recovery in dower, as already noticed.

Statutes
which ex-
tend to copy-
holds.

20 *Hen. 3.*
cap. 1.

So they are within the third and fourth 13 *Ed. 1. c. 3.* chapters of *Westm. 2.* which give a *cui in vitâ, receipt, and quod ei deforceat* (*g*).

(*e*) 2 *Inst.* 109. & *ante. ch. iv.* Of Guardianship.
p. 106.

(*f*) See *Gilb. Ten. 184—5.* & see 3 *Co. 9. a.* *Sed quære,* & *vide post.*—And so of many other acts. But, indeed, the subjects of the several chapters of most statutes differ so greatly that this must frequently occur.

(*g*) *Cro. Car. 43.* 3 *Co. 9. a.*—As to the first chapter, *De Donis*, see *ante. vol. 1. ch. iv.*

But,

But, as the statute *32 Hen. 8. c. 28*, is said to extend to copyholds, it should seem that the *cui in vita* is become unnecessary (*h*).

4 Hen. 7. c. 24. So copyholds are within the statute of *4 Hen. 7.* with respect to fines being a bar on five years non-claim (*i*).

32 Hen. 8. c. 2. So they are within the statute *32 Hen. 8. c. 2.* as to limitations of actions (*k*).

32 Hen. 8. c. 9. So they are within the statute *32 Hen. 8. c. 9.* relative to champerty, maintenance, and buying of titles (*l*).

32 Hen. 8. c. 34. So they are within the statute *32 Hen. 8. c. 34.* enabling grantees of reversion to enter for condition broken (*m*).

(*b*) *Ante. ch. 1. Of Courts.* p. 36. & this chapter.
p. 189.

(*i*) *9 Co. 105. a. Margaret Podger's case.*

(*k*) See *ante. ch. 1. Of Courts.* p. 37. & vol. I.
p. 345. N. (*o*).

(*l*) *4 Co. 26. a. Co. Litt. 369. b.*

(*m*) *Ante. vol. I. p. 120.*

So they seem within the statute 27 ²⁷ Eliz. c. 4.
Eliz. c. 4. of fraudulent conveyances (*n*).

So they are within the statutes 1 & 21 ^{1 Jac. c. 15.}
^{21 Jac. c. 19.} Jac. relative to bankrupts (*o*).

So they are within the seventh section ^{29 Car. 2.}
^{c. 3. s. 7.} of the statute of frauds, which requires all declarations of *trusts* to be in writing (*p*).

So they are within the statute 7 Ann. ^{7 Ann. c. 19.}
c. 19. relative to conveyances by infant
trustees (*q*).

So copyholds seem within the statute ^{4 Geo. 2.}
^{c. 28. s. 5.} 4 Geo. 2. c. 28. s. 5. relative to distresses
for rent arrear (*r*).

(*n*) See *Dougl.* 716. N. [1.] *Doe v. Routledge*, cited:
& *Cowp.* 705. S. C.

(*o*) *Cro. Car.* 550. *Crisp v. Pratt.* *Gilb. Ten.* 182.

(*p*) See N. (3.) to *Co. Litt.* III. b. & *Ambler.*
151. *Withers v. Withers.*

(*q*) See *ante.* vol. I. p. 63.

(*r*) See *ante.* ch. VIII. p. 181,2.

9 Geo. 2. c. 36. So they are within the statute *9 Geo. 2. c. 36.* of *mortmain* (s).

Statutes which do not extend to copyholds. But copyholds are *not* within the tenth chapter of the statute of *Merton*, enabling fuiters to make attorneys (t).

20 Hen. 3. c. 10.

52 Hen. 3. c. 9. Nor do they appear to be within the ninth chapter of the statute of *Marlberge*, which gives contribution for suit (u).

6 Ed. 1. ʃta. 1. c. 12. Nor are they within the twelfth chapter of the statute of *Glocester*, relative to foreign warranty (v).

11 Ed. 1. Nor the statute of *Acton Burnel, de Mercatoribus* (x).

(s) See *1 Ves. 225. Attorney General v. Andrews.* & ante. vol. i. p. 213. *Attorney General v. Lord Weymouth, & al.*

(t) *Ante. p. 106. 189.*

(u) *Ante. ch. viii. Of Suit. p. 179.*

(v) *2 Inst. 325.*

(x) *Moor. 128.* in *Heydon's case.*

Nor the statute of *Westm.* 2. c. 18. of ^{13 Ed. 1.}
^{c. 18.} *elegit (y).*

Nor the statute *de prærogativa regis*, c. 9. ^{17 Ed. 2. &c. 1.}
^{c. 9.} relative to ideots (z).

Nor the statute 16 *Ric.* 2. c. 5. as to ^{16 Ric. 2. c. 5.} papal bulls (a).

Nor the statute 11 *Hen.* 7. c. 20. relative to alienations by the wife of the ^{c. 20.} lands of her husband (b).

Nor the statute of uses (c).

^{27 Hen. 8.}
^{c. 10.}

(y) 3 Co. 9. a. in *Heydon's case*.—As to the first chapter, *De Donis*, see *ante*. vol. I. ch. IV.

(z) *Co. Copyb.* f. 55. Tr. 125. *Watk.* *Gilb. Ten.*
 186. & 223.

(a) *Gilb. Ten.* 186.

(b) *Ibid.* 181. & *ante*, vol. I. p. 185. N. (x).—But if the freehold be conveyed to the husband and wife, the copyhold interest would be gone; and the lands, of consequence, would be within this statute. *Cro. Eliz.* 24. *Stockbridge's case*.

(c) *Ante.* vol. I. p. 100. 185. N. (x.) 328

*27 Hen. 8.
c. 10. s. 9.* Nor the ninth section of the last-mentioned statute, relative to jointures (*d*).

31 Hen. 8. c. 1.

32 Hen. 8.

c. 32.

9 Will. 3.

c. 31.

7 Ann. c. 18.

Nor the statutes enforcing partition (*e*).

*32 Hen. 8.
c. 28. s. 6.* Nor the statute *32 Hen. 8. c. 28. s. 6.* as to a discontinuance by the husband of the wife's land (*f*).

*32 Hen. 8.
c. 28.* Nor the statute *32 Hen. 8. c. 28.* relative to leafes by tenants in tail, or persons seized in right of their wives or churches (*g*).

(*d*) *Gilb. Ten.* 182. See *i Ves.* 54. *Walker v. Walker.*

(*e*) *Co. Copyh.* s. 54. *Tr.* 125. *Gilb. Ten.* 185.

Note, it is said at the end of *Calthorpe* (*Read.* 98.), it was agreed in the Duchy Chamber, that if two joint-tenants, copyholders in fee, make partition, it is good, and no forfeiture nor alienation. But in N. (1.) to *Co. Litt.* 59. a. (*Hale's MSS.*) it is said that partners of copyhold cannot make partition without the lord's licence.

(*f*) *Moor.* 596. *Bullock & Dibley.* *Gilb. Ten.* 178.

(*g*) *Gilb. Ten.* 179. 185.

Nor the statute 32 Hen. 8. c. 37. en-^{32 Hen. 8.}
powering executors to distrain (*h*). *Sed*^{c. 37.}
quære.

Nor the statutes of wills (*i*).

^{32 Hen. 8.}
^{c. 1.}
^{34 Hen. 8.}
^{c. 5.}
^{29 Car. 2. c. 3.}

Nor the statute 13 Eliz. c. 4. for making ^{13 Eliz. c. 4.} accountants' lands liable to pay debts due to the crown (*k*).

Nor the statute 21 Jac. c. 16. of limitations, ^{21 Jac. c. 16.} so as to bar an action for a fine (*l*).

Nor the statute 12 Car. 2. enabling a ^{12 Car. 2.} father to appoint a guardian to his child, ^{c. 24. s. 8.} when there is a custom for the lord to have the wardship; but it should seem that they are within this statute in cases where no such custom prevails (*m*).

(*b*) See *ante*, ch. viii. Of Rents. p. 182.

(*i*) 2 Atk. 36. *Tuffnell v. Page.* *Ante.* vol. I. p. 122.

(*k*) See *Gilb. Ten.* 189.

(*l*) *Ante.* vol. I. p. 321.

(*m*) *Ante.* ch. iv. p. 104.

14 Geo. 2.
c. 20. s. 9.

Nor the statute of 14 Geo. 2. c. 20. s. 9. (n) relative to estates *pour autre vie*; for that section is expressly confined to cases in which there is *no* special occupant. Now there can be no *general* occupant of a copyhold (o); and, of consequence, this statute cannot possibly extend to copyhold property. And, indeed, it would not be here noticed was it not for the observation in *Ambler*.

(n) See *Ambler*. 151. *Withers v. Withers*.

(o) *Ante*. vol. I. p. 302—3.

CONCLUSION.

IN the preceding pages it has been noticed that, according to the feudal institutions from which our legal system of real property is derived, the absolute or ultimate right or dominion in lands was vested in the social body; and, of consequence, must have been considered as virtually resting in that person who was the representative of the state. The king was the representative of the whole nation; and the landed property of the whole nation was, therefore, to be held immediately or mediately of the king. The kingdom was divided into portions or districts, and partly allotted to the several inferior chiefs, and partly remained in the king's hands. The inferior chiefs, in like

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manner, granted out portions of their territory to others; and those others also granted out portions of their possessions to be held of themselves.

What remained in the immediate possession of the king or other lord was said to be *in demesne*, and either lay waste, or was cultivated by his villeins for his use.

Small portions of these demesnes were often allotted to particular villeins under stipulated returns; and the overplus of the profits they, of course, were entitled to for their support. As the assignment of these portions, however, was entirely optional in the lord, so he might have resumed them at his pleasure. The villein held merely at his will.

If the villein behaved himself well, was industrious, and faithful in his returns, he often continued in the possession of the lands: and even when he died, his children were frequently permitted to succeed him. This, however, depended upon the pleasure of the lord: and if the lord consented

fented that some of the posterity of the deceased tenant should again occupy the lands, it was for him to select the individual. Hence the variety of customs as to descents.

As the villein could not acquire any absolute property in his chattels, they, of course, must have fallen to his lord when the villein happened to die. The lord, however, often relinquished his claim in favour of the villein's relations: but as an acknowledgment that such relinquishment was not a matter of right but of favour, he generally required the payment or render of a portion in order to evidence his right to the whole. Hence the payment or render of the best beast or good; which, from its analogy to the military, or proper, heriot, was called by the same term.

When the heir succeeded to the lands of his ancestor, he did it by favour also, and not as of right. Hence he too acknowledged his lord's munificence by paying his relief or fine.

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Holding thus at the will of the lord, the villein could not alien: nor could the absolute or pure villein even relinquish his own possession. When, however, the villein was permitted to determine his tenancy, he could only cease to be a tenant himself; and had no authority to deliver over the possession to another. The lord, however, sometimes accepted his resignation under confidence to re-grant the lands to a person whom the tenant should appoint. This was optional in the lord; and, therefore, he did it under what conditions he chose to insist upon. Hence the fine on alienation, or on the in-coming of a purchaser or tenant.

When the lord had accepted the resignation or surrender of the former tenant, he called in the person whom it was wished should succeed him; that the lord might be satisfied that he was a proper person to be admitted in his tenancy, and to give him the possession of his lands. Hence the origin of our present admission; of the oath of fealty; and of the livery of

of possession or seisin which is still symbolically given.

The new tenant, like the old one, was equally to hold at the will of the lord; and if he ceased to comply with it, the grant also, of consequence, ceased. Hence the doctrine of forfeiture.

Upon the whole, therefore, the law of copyholds seems founded upon principles rational and just in their origin, and perfectly adapted to the manners of the age and people when and among whom they were established.

The right of the lord to his fines and his forfeitures, his privileges and emoluments, remains indisputably good. As copyholds were at the will of the lord, it belonged to the lord to affix the terms of his gift. The ancestor accordingly accepted the gift, and was thankful: and the heir, who now enjoys, ought not to murmur because he has not more than his forefathers, and but for whom he would have nothing to hold: and, more especially, as the alterations that a change of manners has introduced,

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duced, have been uniformly for his benefit. The courts have established his *right* to succeed; have established his *right* to alien. They have even relieved against forfeitures, and restricted the lord in his fines.

The purchaser has no better cause to complain; he knew, or ought to have known, the terms to which the lands were subjected. He purchased with his eyes open; and if he has made a bad bargain, it can only be the consequence of his own indiscretion. If the lands are less valuable than freehold, he has paid a consideration for them proportionably less.

But, on the other hand, it must be evident that, though the principles on which the doctrine of copyholds is founded were originally wise in themselves, yet that many of them are now obsolete, and many forgotten. The necessity, and even propriety, of their continuance has ceased to exist. We have now no villeins, thank God! and the laws which could relate only to villeins ought, therefore, to be swept

swept away. But the progress of manners is always gradual, and often imperceptible; and hence a system is frequently suffered to continue when its principles are disowned.

The wisdom and expediency of a general law, to which all landed property should be alike subject, and the confusion and manifold evils which are inevitably attendant on a diversity of local customs, must be apparent to every one. A nation can scarcely experience a greater curse than a complicated and discordant code. For, according to the remark of an ingenious and elegant writer, “so soon as justice becomes a science, so soon does injustice become a trade.”

The more varied and complex the laws, the less they must necessarily be understood; and the less they are understood the more will the artless and innocent be placed in the power of the artful and rapacious.

As

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As we have manifestly outlived the principles of copyhold-law, why should that law be continued? The happy consequences of the statute of the 12th of *Charles the Second*, which abolished so many feudal incidents, and turned the generality of tenures into that of common socage, hold out to us the strongest encouragement to reduce our laws of real property still more to the standard of wisdom by reducing them to the spirit and manners of the times. Why must we be perpetually appealing to the fool's idol of precedent? Why be dissatisfied with common sense? May not what was just at one period, become, under other circumstances, unjust? Or will truth be no longer truth because our forefathers happened to blunder? Or, finally, may not that which was wise in the infancy of a state become inapplicable when men cease to be rude?

There are many difficulties, it is true, in the way of a general enfranchisement: but what is there of general importance
that

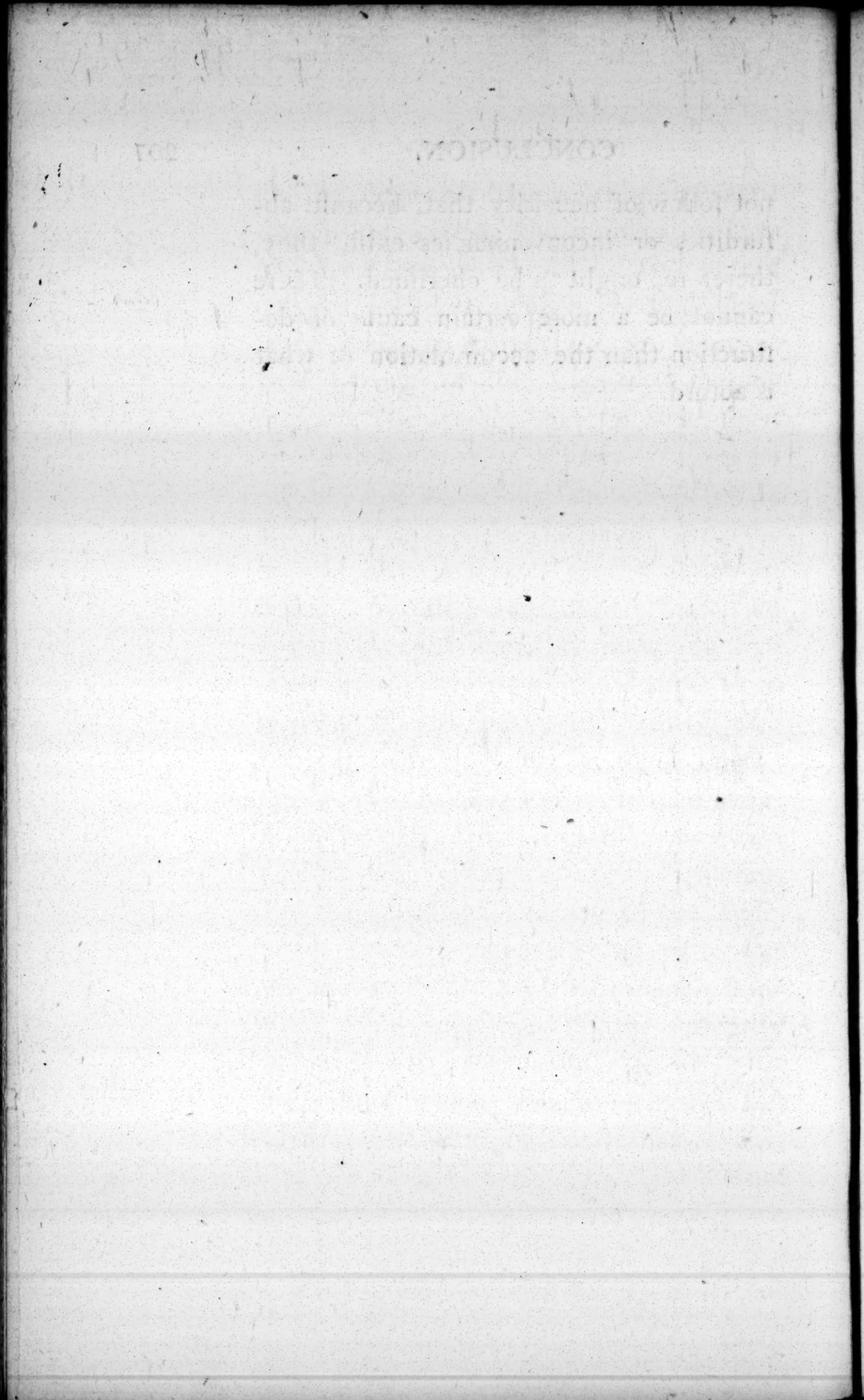
that can be effected without having difficulties to encounter? Without amelioration we must degenerate. A system of jurisprudence cannot remain perpetually the same, while the manners of a nation change. The principles which originated in barbarism, cannot meet the wants of an improved and refining age. The manners of a nation must be stationary, or stationary laws cannot long regulate its conduct. The principles of nature are fixed and immutable, and laws founded on those principles will always apply; but laws founded on arbitrary impositions, or the peculiar manners or necessities of a particular age, should not be permitted to shoulder out common-sense from society, or to incumber the conduct of persons to whom they cannot, in reason, relate.

If every thing desirable cannot be effected, it does not follow that we ought, therefore, to do nothing. If an immediate and universal enfranchisement of copyholds cannot be accomplished, an enfranchisement may be effected partially

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and by degrees. The more we advance towards perfection, the number of evils which we leave will be less. Thus an act may be passed obliging every lord feized in *fee simple* to enfranchise, on so many years average of the seigniorial emoluments. The average may be ascertained by commissioners or a jury. *Tenants in tail* may also be enabled and compelled to enfranchise, as enfranchisement would be so evidently beneficial to the nation at large. A tenant in tail may now, by certain means, alien *the manor* in fee; what impropriety then would there be in enabling him to convey the *freehold of a few copyhold tenements* by some solemn deed? And the power of enfranchisement might be extended as circumstances would admit. The prejudices of the ignorant, and the opposition and arts of the interested, must be expected and met; but we should meet them with manly firmness, while conscious of the integrity of our views. We should recollect, that we cannot reason from a matter of fact to a matter of right; and that it does

not follow of necessity that, because absurdities or inconveniences exist, they, therefore, ought to be cherished. There cannot be a more certain cause of destruction than the accumulation of what is absurd.



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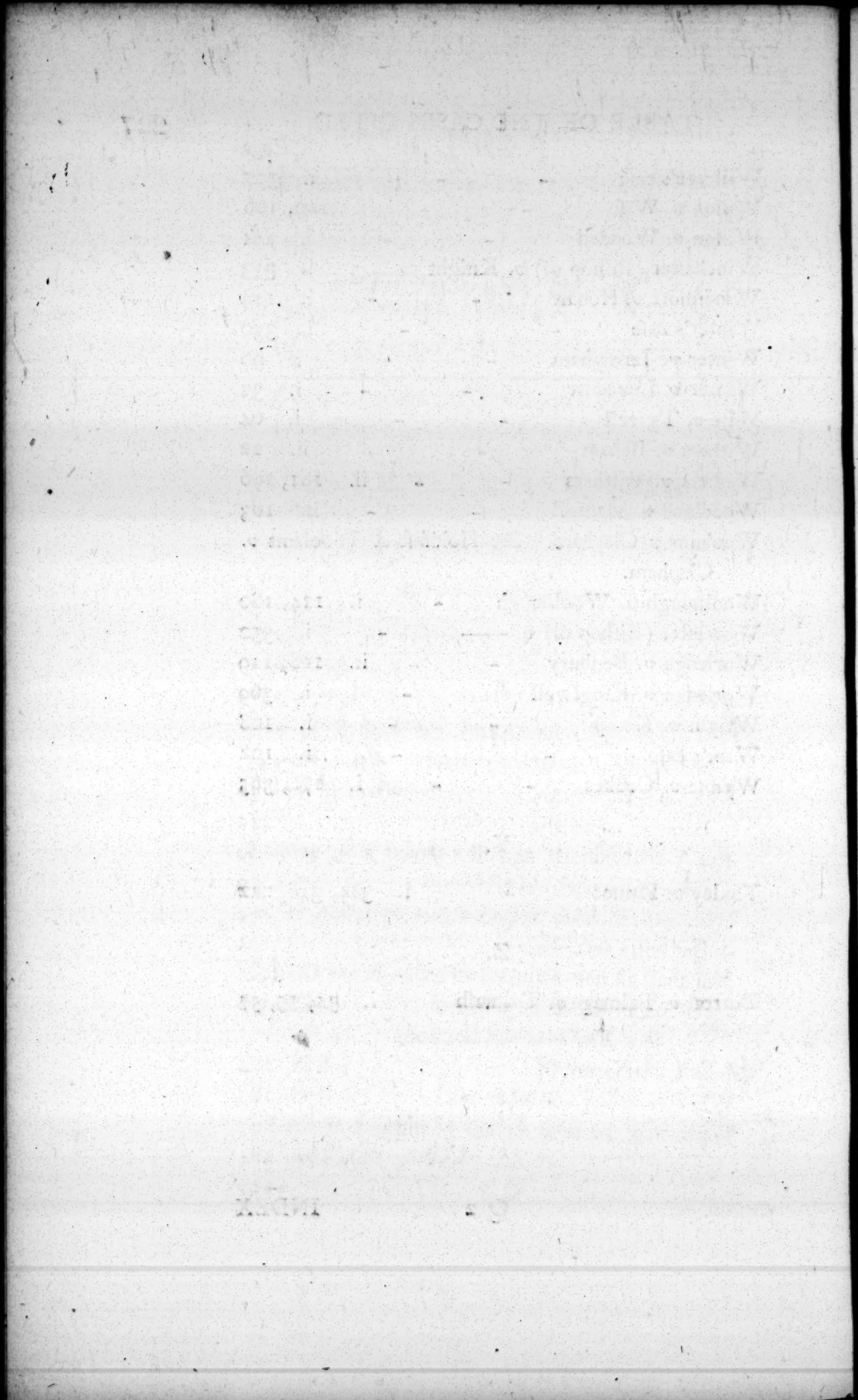
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